THE

FEDERAL JUDICIARY ACTS

OF 1875 AND 1887.

ANNOTATED BY

ROGER FOSTER.

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WITH AN APPENDIX CONTAINING THE EQUITY RULES.

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ROGER FOSTER,

OF THE NEW YORK BAR.

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TABLE OF CASES.

Ackley School District v. Hall, 24.
Adams v. Board of Commissioners, 6.
Adams Express Co. v. Denver & R. G. Ry. Co. 8.
Akers v. Akers, 34.
Alabama v. Wolffe, 11.
Albright v. Teas, 8.
Allen v. Ryerson, 35.
Alley v. Nott, 30.
Ames v. Kansas, 3, 10.
Amory v. Amory, 34.
Amy v. Dubuque, 18.
Andrewes v. Smith, 20.
Anonymous, 38, 47.
Atkins v. Wabash, St. L. & P. R. R. Co. 20.
Attleborough Nat. Bank v. N. W. Mfg. &c. Co. 19.
Ayers v. Watson, 35, 37.
Ayres v. Wiswall, 28.

Baker v. Sleight, 29.
Baldwin v. Franks, 56.
Baltimore & O. R. R. Co. v. Bates, 57.
Bank of Augusta v. Earle, 14.
Barber v. Barber, 5.
Barclay v. Levee Comm'rs 35.
Barnesville & M. Ry. Co., Matter of, 49.
Barney v. Baltimore, 11.
Barney v. Globe Bank, 23.
Barney v. Latham, 10, 29.
Barron v. Burnside, 27.
Barrow v. Hunton, 15, 19.
Barry v. Edmunds, 6, 41.
Barry v. Mercein, 5, 28.
Bartlett v. Sultan of Turkey, 52.
Barton v. Barbour, 54.
Bath County v. Amy, 3.
Beach v. Mosgrove 51.
Bean v. Smith, 23, 24.
Bein v. Heath, 17.
Bell v. Noonan, 30.
Bernard's Township v. Stebbins, 42.
Bible Society v. Grove, 57.
Bills v. New Orleans &c. R. R. Co. 45.
Bininger, *In re*, 3.
Black v. Thorne, 14.
Blair v. St. Louis, H. & K. R. Co. 58.
Blake v. McKim, 10.
Blanchard v. Dwight, 37.
Bondurant v. Watson, 34.
Bonnafee v. Williams, 11.
Boom Co. v. Patterson, 5.
Borer v. Chapman, 16.
Bors v. Preston, 12, 41.
Boston Electric Co. v. Electric Gas-Light Co. 14.
Bowen v. Chase, 33.
Bowen v. Christian, 52.
Bowman v. Ely, 30.
Boyle v. Zacharie, 17.
Briges v. Sperry, 46.
Briggs v. French, 12.
Brigham v. Luddington, 51.
Bright v. Milwaukee &c. R. R. Co. 48.
Brine v. Insurance Co. 17, 18.
Broderick's Will, 18.
Bronson v. Keokuk, 51.
Brooks v. Clark, 29.
Browne v. Browne, 12.
Bruce v. Manchester & K. R. R. Co. 5, 6.
Bryant v. Thompson, 46.
Buck v. Piedmont & A. Ins. Co. 19.
Buckner v. Finley, 20.
Budge v. Northam, 30.
Buford v. Strother, 16.
Burdick v. Hale, 36, 37.
Bushnell v. Kennedy, 21, 23, 46.

C. I. & N. P. R. Co. v. M. & N. W. R. Co. 31.

Calcutta Jute Mills Co. v. Nicholson, 14.
Carrick v. Landman, 28.
Carrington v. Florida R. R. Co. 46.
Carson, v. Dunham, 34, 36, 37, 42.
Carson v. Hyatt, 10.
Case v. Clarke, 13.
Catlett v. Pacific Ins. Co. 12.
Central Trust Co. v. Wabash St. L. & P. R. R. Co. 20.
Chapman v. Barger, 16.
Chapman v. Borer, 19.
Chappedelaine v. Dechenaux, 24.
Charlotte v. Chonteau, 30.
Chesapeake & O. R. R. Co. v. White, 31.
Chicago, St. P. M. & O. Ry. Co. v. Dakota Co. 11.
Childress v. Emory, 24.
Christmas v. Russell, 15.
Civil Rights Cases, 56.
Claflin v. Insurance Cos. 27, 30.
Clark v. Smith, 17, 18.
Clarke v. Mathewson, 15.
Clarkhuff v. Wisconsin I. & N. R. R. Co. 42.
Clarkson v. Manson, 28.
Cleveland Ins. Co. v. Reed, 18.
Coal Co. v. Blatchford, 10, 11.
Cobb v. Globe Mutual Ins. Co. 49.
Coburn v. Cedar Valley L. & C. Co. 35, 37.
Cohens v. Virginia, 7.
Colson v. Lewis, 13.
Commercial & S. Bank v. Corbett, 49.
Commissioners v. Aspinwall, 3.
Conn. Mut. L. I. Co. v. Cushman, 18.
Continental Store Service Co. v. Clark, 8.
Cook v. Hager, 14.
Cook v. Whitney, 30.
Cooke v. Seligman, 34, 37, 38.
Cooper v. Galbraith, 12.
Corbin v. County of Black Hawk, 22.
Core v. Vinal, 29.
Cortes Co. v. Thannhauser, 51, 52.
County of Greene v. Daniel, 3.
County of San Mateo v. Southern Pac. R. R. Co. 2.
County of Tazewell v. Farmers' L. & T. Co. 43, 44.
Cowardin v. Universal L. I. Co. 14.
Cowles v. Mercer Co. 11, 17.
Crellin v. Ely, 52.
Crescent City Co. v. Butcher's Union, 9.
Cummings v. National Bank, 17, 18.

Dart v. McKinney, 45.
Davenport v. County of Dodge, 3.
Davies v. Corbin, 3, 6.
Davies v. Lathrop, 11, 24, 41.
Davis v. James, 18.
Davis v. St. Louis & S. F. R. R. Co. 46.
De Krafft v. Barney, 28.
Delancy v. Wallis, 52.
Dennis v. County of Alachua, 33, 35, 37.
Dennistoun v. Draper, 39.
Deshler v. Dodge, 23.
Detroit v. Dean, 43.
Dinsmore v. Phila. & R. R. R. Co. 11.
Dow v. Chamberlin, 17.
Doyle v. Continental L. I. Co. 27.
Dudley v. Mayhew, 57.
Duncan v. Gegan, 46.
Dunn v. Clarke, 15.
Dwight v. Central Vt. R. R. Co. 19.

Eckert v. Banert, 52.
Edwards v. Conn. Mut. L. I. Co. 46.
Elgin v. Marshall, 5.
Ellis v. Davis, 4, 16, 17.
Endy v. Commercial F. I. Co. 35.
Estes v. Gunter, 6.
Etting v. Marx, 18.
Evans v. Davenport, 12.
Everhart v. Huntsville College, 12.
Express Co. v. Kountze, 13.

Falls Wire Mfg. Co. v. Broderick, 28.
Fargo v. L. N. A. & C. Ry. Co. 11.
Farlow v. Lea, 11.
Farmington v. Pillsbury, 42.
Fidelity Ins. Co. v. Huntington, 29.
Fidelity Trust Co. v. Gill Car. Co. 46.
Fisk, *Ex parte*, 39.

Fisk v. Union Pacific R. R. Co. 37, 46.
Fitch v. Creighton, 17, 18.
Flash v. Dillon, 16.
Fletcher v. Hamlet, 29.
Fogg v. St. Louis H. & K. R. R. Co. 19.
Forsyth v. Pierson, 51.
Fouvergne v. New Orleans, 4.
Frank v. Avery, 33.
Fraser v. Jennison, 28.
Freeman v. Howe, 15.
Frelinghuysen v. Baldwin, 30.
French v. Roe, 52.
Friedman v. Israel, 39.
Friezen v. Allemania F. I. Co. 46.
Fuller v. County of Colfax, 5.

Gaines v. Fuentes, 4, 16, 17.
Gassies v. Ballon, 12.
Gibbs v. Crandall, 9.
Gibson v. Bruce, 34.
Gilman v. Perkins, 19.
Gloucester Ferry Co. v. Pennsylvania, 27.
Godden v. Kimmell, 18.
Gold Washing & Water Co v. Keyes, 9, 34.
Gordon v. Hobart, 17.
Grace v. American Cent. Ins. Co. 31, 34, 41.
Gracie v. Palmer, 14.
Graham v. B. H. & E. R. R. Co. 11.
Graham v. Norton, 3.
Green v. Custard, 27.
Greene County v. Daniel, 3.
Greenwood v. Freight Co. 43.
Gregory v. Hartley, 30.

Hagan v. Lucas, 19.
Hamilton v. Chouteau, 19.
Hanover Nat. Bank v. Smith, 27.
Hans v. Louisiana, 9.
Hartell v. Tilghman, 8.
Harter v. Kernochan, 10.
Hartog v. Memory, 41.
Harvey v. Virginia, 9.
Hat Sweat Manufg. Co. v. Reinoehl, 8.
Hawes v. Oakland, 42.
Heath v. Erie Ry. Co. 52.
Heidritter v. Elizabeth Oil-Cloth Co. 19, 20.
Hendrickson v. Chicago R. I. & P. R. R. Co. 46.
Hepburn v. Ellzey, 11.
Herndon v. Ridgway, 52.
Hess v. Reynolds, 4, 16, 57.
Hinckley v. Railroad Co. 39.
Hitner v. Suckley, 52, 53.
Hoadley v. San Francisco, 31.
Hodge v. Hudson River R. R. Co. 14.
Holland v. Challen, 17, 18.
Holland v. Chambers, 56.
Hone v. Dillon, 30.
Hook v. Payne, 16.
Houser v. Clayton, 35.
Houston & T. C. R. R. Co. v. Shirley, 29, 34.
Hovey v. Rubber Tip Pencil Co. 57.
Hubbard v. Bellew, 19.
Hull v. Dills, 19.
Hummel v. Moore, 46.
Huntington v. Palmer, 42.
Hurd v. Moiles, 20.
Hurt v. Hollingsworth, 45.
Hutchinson v. Green, 19.
Hyde v. Ruble, 28, 56.
Hyde v. Stone, 16.

Ingersoll v. Wilson, 30.
Insurance Co. v. Comstock, 31.
Insurance Co. v. Dunn, 31, 38.
Insurance Co. v. Morse, 27.
Iowa & Minn. Construction Co. *In re*, 19.

Johnson v. Johnson, 5.
Johnson v. Monell, 29, 30.
Johnston v. Donvan, 35.
Jones v. Andrews, 15.
Josslyn v. Phillips, 38.

Kanouse v. Martin, 27, 31.
Kansas v. Bradley, 9.
Kauffman v. Kennedy, 46.
Kelly v. Virginia P. I. Co. 46.

Kenworthy v. Accunor, 52.
Kern v. Huidekoper, 19, 38.
Kerr v. Whitaker, 33.
Kilgour v. New Orleans G. L. Co. 51.
King v. Cornell, 56.
King v. Wilson, 6.
Kirby v. Lake Shore & M. S. Ry. Co. 18.
Kirk v. Milwaukee D. C. Mfg. Co. 39.
Kounsalear v. Clarke, 33.
Krippendorf v. Hyde, 15.
Kurtz v. Moffitt, 28.

Lacroix v. Lyons, 42, 45.
La Mothe Mfg. Co. v. National T. W. Co. 45.
Lanier v. Nash, 42.
Lanz v. Randall, 12.
Leather Manuf'rs. Bank v. Cooper, 9, 29, 55.
Lee v. Lee, 5, 28.
Levi v. Columbia Ins. Co. 19.
Levy v. Laclede Bank, 20.
Lewis v. Fire Ins. Co. 30, 33.
Little v. Giles, 29, 42.
Liverpool Ins. Co. v. Massachusetts, 11.
Loomis v. Carrington, 46.
Lorman v. Clarke, 17.
Louisiana v. Jumel, 3.
Louisville, C. & C. R. R. Co. v. Letson, 11.
Louisville & N. R. R. Co. v. Ide, 28, 29.

Mac Naughton v. Southern Pac. C. R. R. Co. 35.
Mahoney Mining Co. v. Bennett, 49.
Maine v. Gilman, 27.
Maloy v. Duden, 12, 31.
Maltz v. American Express Co. 11.
Manhattan Ry. Co. v. New York, 10.
Market Co. v. Hoffman, 6.
Marshall v. Balto. & O. R. R. Co. 11.
Martin, *In re*, 3.
Martin v. Thompson, 9.
Maryland v. Baldwin, 11.
Matthews v. Warner, 17.
McBratney v. Usher, 49.
McClung v. Silliman, 2.
McCluny v. Silliman, 18.
McCormick v. Gray, 6.
McGinnity v. White, 28.
McGregor v. McGillis, 48.
McHenry v. N. Y. P. & O. R. Co. 30.
McIntire v. Wood, 2.
Meath v. Phillips County, 18.
Merchants' &c. Nat. Bank v. Wheeler, 45.
Mersman v. Werges, 21.
Meyers v. Block, 17.
Miles v. Scott, 17.
Miller v. C. B. & Q. R. R. Co. 30.
Miller v. Tobin, 49.
Milligan v. Lalance & G. Mfg. Co. 46.
Millison v. Holmes, 30.
Minnesota Co. v. St. Paul Co. 15.
Miss. & M. R. R. Co. v. Ward, 6.
Mix v. Andes Ins. Co. 37.
Mollan v. Torrance, 23.
Moore v. Chicago, St. P. M. & O. Ry. Co. 11.
Mossman v. Higginson, 11.
Muller v. Dows, 11.
Murray v. Holden, 38.
Murray v. N. J. R. R. Co. 30.
Mutual L. I. Co. v. Champlin, 29.

Neves v. Scott, 17.
New Jersey Zinc Co. v. Blood, 30.
New Orleans v. Winter, 11.
New Providence v. Halsey, 24, 42.
New Windsor T. R. v. Wilson, 29.
Nickerson v. Atchison, T. & S. F. R. R. Co. 17.
Noonan v. Lee, 17.

Ober v. Gallagher, 23, 24, 28.
Oglesby v. Attrill, 52.
Ohio & Miss. R. R. Co. v. Wheeler, 11.
Orvis v. Powell, 18.
Osborn v. U. S. Bank, 7, 8.
Osgood v. Chicago, D. & V. R. R. Co. 37, 38.

Ott v. McHenry, 30.
Owens v. Ohio Cent. R. R. Co. 19.

Pacific RR. Co. v. Ketchum, 10, 41.
Pacific RR. Co. v. Mo. Pac. R. R. Co. 15, 52.
Pacific R. R. Removal Cases, 7.
Parker, *In re*, 58.
Paul v. Virginia, 27.
Pawlet v. Clark, 13.
Payne v. Hook, 16, 17, 19.
Peale v. Phipps, 19.
Pennsylvania v. Quicksilver Co., 13.
Penna R. R. Co. v. St. Louis, A. & T. H. R. R. Co. 11.
People v. Long Island R. R. Co. 30.
People v. Webb, 30.
People v Williams, 30.
People v. Wright, 30.
Perkins v. Hendryx, 45.
Phelps v. Canada Cent. R. Co. 39.
Phelps v. Elliott, 45.
Phelps v. O'Brien County, 17.
Phila. Fire Ass'n v. New York, 27.
Picquet v. Swan, 51.
Pilla v. German School Ass'n, 45.
Pirie v. Tvedt, 29.
Plymouth Mining Co. v. Amador Canal Co. 29.
Poole v. Thatcherdeft, 16.
Pratt v. Fitzhugh, 5, 28.
Providence & N. Y. S. S. Co. v. Hill Mfg. Co. 54.
Provident Savings Society v. Ford, 9, 10.
Public Grain &c. Exchange v. W. U. Tel. Co. 37.
Pulliam v. Pulliam, 18.
Pullman Palace Car Co. v. Speck, 38.
Putnam v. Ingraham, 28, 29.

Quincy v. Steel, 43, 44.

Raband v. De Wolf, 12.
Railroad Co. v. Harris, 11.
Railroad Co. v. Koontz, 48, 49.
Railroad Co. v. Wiswall, 31.
Railroad Companies v. Chamberlain, 15.
Railway Co. v. Ramsey, 34.
Railway Co. v. Whitton, 11, 17.
Rateau v. Bernard, 11.
Read v. Consequa, 52.
Removal Cases, 10, 31, 35, 38.
Reynolds v. Crawfordsville Nat. Bank, 17, 18.
Riggs v. Johnson County, 3.
Roberts v. Nelson, 27.
Robertson v. Carson, 13.
Robinson v. Anderson, 42.
Rosenbaum v. Bauer, 3.
Ross v. Prentiss, 6.
Rowell v. Hill, 48.
Rubber Co. v. Goodyear, 52.
Rumsey v. Call, 42.
Russell v. Farley, 17.

Sahlgard v. Kennedy, 19.
St. Clair v. Cox, 14.
St. Louis & S. F. Ry. Co. v. Wilson, 29.
St. Paul & C. Ry. Co. v. McLean, 35, 48.
Sanderson v. Bayley, 58.
Sands v. Smith, 30.
San Mateo County v. Southern Pac. R. R. 2.
Sawyer v. Gill, 52, 53.
Sayles v. Northwestern Ins. Co. 46.
Scharff v. Levy, 30.
Schnadig v. Flescher, 30.
Schollenberger, *Ex parte*, 14.
Segee v. Thomas, 52, 53.
Sere v. Pitot, 21, 24.
Seymour v. Phillips Construction Co. 15.
Shaw v. Hamilton, 30.
Sheldon v. Sill, 21, 22.
Sheldrick v. Cockcroft, 37.
Shelton v. Tiffin, 12.
Shields v. Thomas, 6.
Sloan v. Smith, 33.
Sloane v. Anderson, 29.
Smith v. Greenhow, 9.
Smith v. Hortler, 30.
Smith v. Kernochen, 22.
Smith v. Railroad Co. 17.
Smith v. Standard Laundry Machinery Co. 8.
Southern Pac. R.R.Co. v. California, 7.

Southworth v. Adams, 4.
Sparrow v. Strong, 5.
Spring Co. v. Knowlton, 46.
Stafford v. Amer. Mills Co. 14.
Starin v. New York, 7, 29.
State *ex rel* Barker v. Bowen, 3, 9.
Steamship Co. v. Tugman, 11, 13, 31, 34.
Stephen v. Ciui, 52.
Stevens v. Richardson, 37.
Stewart v. Dunham, 28.
Stoddart v. Nelson, 58.
Stone v. South Carolina, 37, 42.
Strauder v. West Virginia, 56.
Supervisors v. United States, 3.
Sutherland v. Jersey City & B. R. Co. 33.
Sutro v. Simpson, 46.
Suydam v. Broadnax, 16.
Sweeney v. Coffin, 35.
Symonds v. Greene, 6.

Table Mountain &c. Co. v. Wallers &c. Co. 30.
Taylor v. Carryl, 19.
Taylor v. Holmes, 10.
Taylor v. Shew, 37.
Tazewell County v. Farmers' L. & T. Co. 44.
Tennessee v. Davis, 7, 56.
Thompson v. Railroad Cos. 17.
Tooms v. Randall, 33.
Torrey v. Grant Works, 37.
Trafton v. Nougues, 34.
Tredway v. Sanger, 21.
Turner v. Bank of North America, 12, 23.

Union Bank v. Jolly, 16.
Union Mut. L. I. Co. v. Univ. of Chicago, 19.
Union Pacific RR. Co. v. Hall, 3.
Union Trust Co. v. Rockford, R. I. & St. L. R. R. Co. 20.
United States v. American Bell Telephone Co. 14.
United States v. New Orleans, 3.
United States v. Pratt Coal & Coke Co. 7, 35.
United States v. Thompson, 18.
United States v. Union Pac. R. R. Co. 3.
United States v. Waddell, 56.

Van Norden v. Morton, 17.
Van Orden, *Ex parte*, 3.
Van Rensselaer v. Douglas, 30.
Virginia v. Rives, 56.

Wagner v. Baird, 18.
Ward v. Seabry, 52.
Warren v. W. V. R. R. Co. 5.
Webb v. Vermont Cent. R. R. Co. 19.
Webber v. Humphreys, 16.
Weber v. Lee County, 3.
Webster v. Crothers, 45.
Wescott v. Fairfield, 11.
Western Union Tel. Co. v. Atlantic & P. T. Co. 54.
Wheeler v. McCormick, 14.
Whitman v. Hubbell, 6.
Williams v. Nottawa, 40, 42.
Williams M. & R. Co. v. Raynor, 39.
Wilson v. City Bank, 12.
Wilson v. Daniel, 6.
Winberg v. B. C. R. R. & Lumber Co. 38.
Winchell v. Coney, 48.
Winnemans v. Edgington, 36.
Wolf v. Conn. Mut. L. I. Co. 38.
Wolff v. Archibald, 34.
Woodman v. Latimer, 6.
Woolridge v. McKenna, 12, 35.
Wormley v. Wormley, 10.
Wormser v. Dahlman, 35.
Wright v. Wells, 27.

Yarbrough, *Ex parte*, 56.
Yonley v. Lavender, 19.
Young v. Bryan, 23.
Young v. Merchants' Ins. Co. 38.

Zobieskie v. Bauder, 29.

SECTION I. OF JUDICIARY ACT OF 1875,

AS AMENDED IN 1887.

PUBLIC—NO. 159.

AN ACT to amend the Act of Congress approved March third, eighteen hundred and seventy-five, entitled "An Act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," and to further regulate the jurisdiction of circuit courts of the United States, and for other purposes.

APPROVED March 3, 1887.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first section of an act entitled "An Act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," approved March third, eighteen hundred and seventy-five, be, and the same is hereby, amended so as to read as follows:

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversary the United States are plaintiffs or petitioners, or in which there shall be a controversary between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a con-

troversary between citizens of the same State, claiming lands under grants of different States, or a controversary between citizens of a State and foreign States, citizens or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offences cognizable by them. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process of proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder of such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made; and the circuit courts shall also have appellate jurisdiction from the district courts, under the regulations and restrictions prescribed by law."

SUITS OF A CIVIL NATURE.

"The terms used in the Act of 1875—'suits of a civil nature'—are less comprehensive than the term 'cases' in the Constitution. The latter may embrace proceedings not usually or strictly termed suits and prosecutions of a criminal nature." (Field, J., in County of San Mateo v. Southern Pacific R. R. Co. 13 Fed. R. 145.)

MANDAMUS.

An application for a mandamus is not such a suit (McIntire v. Wood, 7 Cranch, 504; McClung v. Silliman, 6 Wheaton, 598;

County of Greene v. Daniel, 102 U. S. 187, 195; Davenport v. County of Dodge, 105 U. S. 237, 242, 243; Louisiana v. Jumel, 107 U. S. 711, 727; Bath County v. Amy, 13 Wallace, 244; Graham v. Norton, 15 Wallace, 427; Rosenbaum v. Bauer, 120 U. S. 450) unless it is ancillary to some other proceeding cognizable by the Federal courts. (U. S. R. S. § 716; Riggs v. Johnson County, 6 Wallace, 166; Davies v. Corbin, 112 U. S. 36; Commissioners v. Aspinwall, 24 Howard, 376; Supervisors v. United States, 4 Wallace, 435; Weber v. Lee County, 6 Wallace, 210; United States v. New Orleans, 98 U. S. 381.) Special statutory provisions empower the circuit courts of the United States to issue a mandamus to compel compliance with its charter by the Union Pacific Railroad, "to operate its road as required by law" (Act of March 3d, 1873; 17 St. at Large, 509; United States v. U. P. R. R. Co. 2 Dillon, 527; U. P. R. R. Co. v. Hall, 91 U. S. 143), and to compel an officer of the United States to perform any of the duties prescribed by the act regulating the taxation of costs due clerks, marshals, and district attorneys, etc. (Act of February 22d, 1875; 18 St. at Large, 333; Supplement to U. S. R. S., ch. 90, pp. 143–145.) The Inter-State Commerce Act may also be enforced by mandamus.

HABEAS CORPUS.

Writs of habeas corpus are regulated by U. S. R. S. §§ 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766.

QUO WARRANTO.

Under the Judiciary Act of 1875, it was held that an action in the nature of a *quo warranto* brought by a State in one of her own courts against a corporation chartered by her could be removed into a Federal Court when it was a case arising under the constitution or laws of the United States. (Ames v. Kansas, 111 U. S. 449. See, however, State *ex rel.* Barker v. Bowen, 8 S. C. 382.)

WRITS OF PROHIBITION.

It seems that writs of prohibition can only be issued by the Supreme Court. (U. S. R. S. § 688; *Re* Binninger, 7 Blatchford, 159.)

WRITS OF CERTIORARI.

A Circuit Court of the United States has no power to issue a writ of certiorari (*ex parte* John Van Orden, 3 Blatchford, 166, *per* Betts, J.), except as process ancillary to a case of which the statutes give it jurisdiction. (*In re* Robert M. Martin, 5 Blatchford, 303, *per* W. D. Shipman, J.)

PROBATE OF WILLS.

It has been said that "the courts of the United States have no probate jurisdiction." (Fouvergne v. New Orleans, 18 Howard, 470; Southworth v. Adams, 11 Reporter, 46.) When, however, the statute or customary law of a State gives its courts jurisdiction of a suit to establish a lost will (Southworth v. Howard, 11 Reporter, 46), or to set aside the probate of a will, it was held, under former statutes, that the Federal court might take jurisdiction of such a suit upon removal. (Gaines v. Fuentes, 92 U. S. 10.)

PROCEEDINGS TO ANNUL A WILL.

Under the Judiciary Act of 1875, it was held that a proceeding to annul a will under the Louisiana statute was removable when citizens of different States were on opposite sides of a controversy therein. (Gaines v. Fuentes, 92 U. S. 10.) Judge Field then said (*ibid.* p. 20): "A controversy was involved in the sense of the statute whenever any property or claim of the parties, capable of pecuniary estimation, was the subject of the litigation, and was presented by the pleadings for judicial determination." Whether such a proceeding could then be originally instituted in a circuit court of the United States was not then decided. (See, however, Ellis v. Davis, 109 U. S. 485.) The language of the Act of 1875 concerning suits of which that court had original cognizance was the same as that construed in this case, and, so far as this point is concerned, is retained in the Act of 1887. If such a proceeding cannot now be instituted in a Federal court, it cannot be removed to one. (See Sub-Section 2 of Section 1 of Act of 1887, *infra*, p. 25.)

CLAIMS AGAINST DECEDENTS' ESTATES.

Under the Judiciary Act of 1875, it was held that a proceeding in a court of probate under a Michigan statute providing for the trial there of claims against a decedent's estate could be removed to the Federal circuit court when citizens of different States were on opposite sides of a controversy therein. (Hess v. Reynolds, 113 U. S. 73.) See observations under Proceedings to Annul a Will for the application of this case to the present statute.

CONDEMNATION PROCEEDINGS.

Under the Judiciary Act of 1875, it was held that proceedings instituted by a corporation chartered by a State to condemn lands in the exercise of the right of eminent domain, when they had come before a State court, could be removed to the Circuit Court of the

United States, if citizens of different States were on opposite sides of a controversy therein. (Boom Company v. Patterson, 98 U. S. 403 ; S. C. 3 Dillon, 465 ; Warren v. W. V. R. R. Co. 6 Bissell, 425. But see Fuller v. County of Colfax, 14 Fed. R. 177.) See observations under Proceedings to Annul a Will for the application of this case to the present statute.

DIVORCE.

"We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board." (Barber v. Barber, 21 Howard, 582, 584 ; Johnson v. Johnson, 13 Fed. R. 193.) It was held, however, by a divided court, that a Circuit Court of the United States, sitting in equity, might sustain a bill filed on behalf of a married woman by her next friend to enforce payment of alimony awarded by a decree of a State court. (Barber v. Barber, 21 Howard, 582.)

MATTER IN DISPUTE.

"The rule, it is true, is an arbitrary one, as it is based upon a fixed amount, representing pecuniary value, and for that reason excludes the jurisdiction of this court in cases which involve rights that, because they are priceless, have no measure in money. (Lee v. Lee, 8 Pet. 44 ; Barry v. Mercein, 5 How. 103 ; Pratt v. Fitzhugh, 1 Black, 271 ; Sparrow v. Strong, 3 Wall. 97.) But, as it draws the boundary line of jurisdiction, it is to be construed with strictness and rigor. As jurisdiction cannot be conferred by consent of parties, but must be given by the law, so it ought not to be construed by doubtful constructions." "It would be clearly a violation of the rule to add to the value of the matter determined by any estimate in money, by reason of the probative force of the judgment itself in some subsequent proceeding that would often depend upon contingencies, and might be mere conjecture and speculation, while the statute evidently contemplated an actual and present value in money, determined by a mere inspection of the record." (Waite, C. J., in Elgin v. Marshall, 106 U. S. 579, 580. To the same effect is Bruce v. Manchester and Keene R. R. Co. 117 U. S. 514.)

"It was not intended to say that on every such question of jurisdiction the demand of the plaintiff is alone to be regarded ; but that the value of the thing put in demand furnished the rule. The nature

of the case must certainly guide the judgment of the court; and whenever the law makes a rule, that rule must be pursued. Thus in an action of debt on a bond for £100, the principal and interest are put in the demand, and the plaintiff can recover no more, though he may lay his damages at £10,000. The form of the action, therefore, gives in that case the legal rule. But in an action of trespass or assault and battery, where the law prescribes no limitation as to the amount to be recovered, and the plaintiff has a right to estimate his damages at any sum, the damage stated in the declaration is the thing put in demand, and presents the only criterion to which, from the nature of the action, we can resort in settling the question of jurisdiction." (Wilson v. Daniel, 3 Dallas, 401, 407, *per* Ellsworth, C. J.; approved in Barry v. Edmunds, 116 U. S. 550, 560.)

The matter in dispute upon a bill filed solely for an accounting is the amount of the disputed items of the account. (McCormick v. Gray, 13 Howard, 26.)

In a suit in equity to enjoin the use of a trade-mark and to compel an account of profits, the amount of the matter in dispute is not limited to the amount of profits of which an account is sought. The trade-mark which it is sought to enforce may be much more valuable. (Symonds v. Greene, 28 Fed. R. 834.)

In a suit for an injunction the value of the object to be gained by the bill, not the amount of the plaintiff's damages, is the test of jurisdiction. (M. & W. R. R. Co. v. Ward, 2 Black, 485; Market Company v. Hoffman, 101 U. S. 112; Whitman v. Hubbell, 30 Fed. R. 1.) "The jurisdiction does not depend upon the amount of any contingent loss or damage which one of the parties may sustain by a decision against him, but upon the amount in dispute between them." (Taney, C. J., in Ross v. Prentiss, 3 Howard, 771, 772.)

When a number of plaintiffs, claiming under the same title and having a common interest in the relief sought, unite in a suit, action, or proceeding, their united interests constitute "the matter in dispute." (Shields v. Thomas, 17 Howard, 3; Market Company v. Hoffman, 101 U. S. 112; Davies v. Corbin, 112 U. S. 36; Estes v. Gunter, 121 U. S. 183. But see King v. Wilson, 1 Dillon, 555, 568; Woodman v. Latimer, 2 Fed. R. 842.) When, however, a suit is brought by one for himself and all others of a class similarly situated, the aggregate interest of those who join with him, not that of the whole class, constitutes "the matter in dispute." (Bruce v. M. & K. R. R. Co. 117 U. S. 514, 516; Adams v. Board of Commissioners, McCahon (U. S. C. C. D. Kansas), 235.)

The pleadings should show that the value of the matter in dispute

exceeds the jurisdictional amount. (United States v. Pratt Coal and Oil Co. 18 Fed. R. 708.)

See the collection of authorities in the opinion of Gray, J., in Gibson v. Shufeldt, 122 U. S. 27.

ARISING UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES.

This is substantially the language of the Constitution (Article III. § 2) : " A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution of a law of the United States, whenever its correct decision depends on the construction of either." (Marshall, C. J., in Cohens v. Virginia, 6 Wheaton, 264, 379.) " Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defence of the party in whole or in part, by whom they are asserted." (Strong, J., in Tennessee v. Davis, 100 U. S. 257, 264.) " If from the questions it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the Act of 1875 ; otherwise not." (Waite, C. J., in Starin v. New York, 115 U. S. 248, 257 ; Southern Pacific R. R. v. California, 118 U. S. 109, 112.)

When the plaintiff or defendant is a corporation chartered by Congress, the case is one arising out of a law of the United States. (Osborn v. U. S. Bank, 9 Wheaton, 738 ; Pacific Railroad Removal Cases, 115 U. S. 1 ; F. L. & Tr. Co. v. D. S. P. & P. R. R. Co. 1 Ry. & Corp. L. J. 584.)

" We think, then, that when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or law may be involved in it. The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States ; it is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same

law. Can a being thus constituted have a case which does not arise literally, as well as substantially, under the law? Take the case of a contract, which is put as the strongest against the bank. When a bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, Has this legal entity a right to sue? Has it a right to come, not into this court particularly, but into any court? This depends on a law of the United States. The next question is, Has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely upon a law of the United States. The question forms an original ingredient in every cause. Whether it be in fact relied on or not in the defence, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not. The appellants say that the case arises on the contract; but the validity of the contract depends on a law of the United States, and the plaintiff is compelled in every case to show its validity. The case arises emphatically under the law. The act of Congress is its foundation. The contract could never have been made but under the authority of that act. The act itself is the first ingredient in the case, is its origin, is that from which every other part arises. That other questions may also arise, as the execution of the contract or its performance cannot change the case or give it any other origin than the charter of incorporation. The action still originates in and is sustained by that charter." (Osborn v. U. S. Bank, 9 Wheaton, 738, 823, *per* Marshall, C. J.)

When the corporation has been created by a territorial law, it seems that the rule is different. (Adams Express Co. v. Denver & R. E. R. R. Co. 16 Fed. R. 712.) National banks are now excepted by Section 4 of the Judiciary Act of 1887. (*Infra*, p. 55.)

It has been held by a divided court, that a case does not arise under the laws of the United States, though brought to enjoin the infringement of a patent, when the defendant admits the validity of the patent, and rests his defence upon an alleged license from the plaintiff. (Hartell v. Tilghman, 99 U. S. 547. Approved in Albright v. Teas, 106 U. S. 613. But see Smith v. Standard Laundry Machinery Co. 19 Fed. R. 825; Continental Store Service Co. v. Clark, 100 N. Y. 365; Hat Sweat Manufacturing Co. v. Reinoehl, 102 N. Y. 167.)

A suit on a judgment recovered in a court of the United States is not necessarily a suit arising under the laws of the United States. (Provident Savings Society v. Ford, 114 U. S. 635.) "What is a judgment but a security of record showing a debt due from one person to another? It is as much a mere security as a treasury note or a bond of the United States. If A brings an action against B, trover or otherwise, for the withholding of such securities, it is not therefore a case arising under the laws of the United States, although the whole value of the securities depends upon the fact of their being the obligations of the United States. So if A have title to land by patent of the United States, and brings an action against B for trespass or waste, committed by cutting timber, or by mining and carrying away precious ores, or the like, it is not therefore a case arising under the laws of the United States. It is simply the case of an ordinary right of property sought to be enforced. A suit or a judgment is nothing more, unless some question is raised in the case (as might be raised in any of the cases specified) distinctly involving the laws of the United States." (Bradley, J., in Provident Savings Society v. Ford, 114 U. S. 635, 642, 643. See also Gold Washing and Water Co. v. Keyes, 96 U. S. 199; Smith v. Greenhow, 109 U. S. 669; Gibbs v. Crandall, 125 U. S. 105; Martin v. Thompson, 120 U. S. 376; Crescent City Co. v. Butchers' Union, 120 U. S. 141.) "A case does not arise under the laws of the United States simply because this court, or any other Federal court, has decided in another suit the questions of law which are involved." (Waite, C. J., in Leather Manufacturers' Bank v. Cooper, 120 U. S. 778, 781.)

"When a proposition has once been decided by the Supreme Court, it can no longer be said that in it there still remains a Federal question. More correctly it is said that there is no question, State or Federal." (Brewer, J., in Kansas v. Bradley, 26 Fed. R. 289, 290.)

It has been held that an action in the nature of a *quo warranto*, to determine the title to the office of electors of President and Vice-President, cannot on this ground be considered a suit arising under the Constitution and laws of the United States. (State *ex rel* Barker v. Bowen, 8 S. C. 382.) It has been held in one circuit, that a State cannot be sued by one of its own citizens in a Federal court, although the plaintiff seeks to enforce a right dependent upon the construction of the Constitution of the United States (Hans v. Louisiana, 24 Fed. R. 55, *per* Billings, J.), but it has been intimated in another circuit that this may be done. (Harvey v. Virginia, 20 Fed. R. 411, 415, *per* Hughes, J.) Before the Act of 1887 it was held that a suit in-

stituted by a State against one of her own citizens might in a proper case be removed into a Federal court. (Ames v. Kansas, 111 U. S. 470.)

The pleadings must state the facts which show that the case is one arising under the Constitution and laws of the United States. An allegation in the language of the statute is insufficient. (Manhattan Railway Co. v. New York, 18 Fed. R. 195 ; Provident Savings Society v. Ford, 114 U. S. 635.)

CONTROVERSARY.

This word takes the place of "controversy," which is used both in the Constitution and in the Act of 1875. The word "controversy" has been thus defined by Chief Justice Waite (Removal Cases, 100 U. S. 457, 468) : "This we understand to mean that when the controversy about which a suit in a State court is brought is between citizens of one or more States on one side, and citizens of other States on the other side, either party to the controversy may remove the suit to the circuit court, without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the purposes of a removal, the matter in dispute may be ascertained, and the parties to the suit arranged on opposite sides of that dispute. If in such arrangement it appears that those on one side are all citizens of different States from those on the other, the suit may be removed. Under the old law the pleadings only were looked at, and the rights of the parties in respect to a removal were determined solely according to the position they occupied as plaintiffs or defendants in the suit. (Coal Company v. Blatchford, 11 Wall. 174.) Under the new law the mere form of the pleadings may be put aside and the parties placed on different sides of the matter in dispute, according to the facts. This being done, when all those on one side desire a removal, it may be had if the necessary citizenship exists." (See also Pacific Railroad v. Ketchum, 101 U. S. 289 ; Barney v. Latham, 103 U. S. 205 ; Carson v. Hyatt, 118 U. S. 279, 286.) A controversy between citizens of different States is one in which every party upon one side is a citizen of a different State from every party upon the other. (Blake v. McKim, 103 U. S. 336.) The citizenship of formal parties with no real interest in the controversy does not affect the jurisdiction. (Removal Cases, 100 U. S. 457 ; Barney v. Latham, 103 U. S. 205 ; Harter v. Kernochan, 103 U. S. 562 ; Wormley v. Wormley, 8 Wheaton, 421 ; Taylor v. Holmes, 14 Fed. R. 499.)

An action upon a bond brought in the name of a State for the use of a private individual is, for the purposes of jurisdiction, regarded as if brought in the name of the latter. (Maryland v. Baldwin, 112 U. S. 490.)

CITIZENSHIP.

Upon this ground, the statute gives no jurisdiction of a controversy between two aliens (Mossman v. Higginson, 4 Dallas, 12 ; Rateau v. Bernard, 3 Blatchford, 244) ; or between a citizen of the District of Columbia (Hepburn v. Ellzey, 2 Cranch, 445 ; Westcott v. Fairfield, Peters C. C. 45 ; Barney v. Baltimore, 1 Hughes, 118), or a citizen of a Territory (New Orleans v. Winter, 1 Wheaton, 91) and a citizen of a State, unless there is some other ground of jurisdiction. A suit brought by a State against a citizen of another State cannot on that ground alone be cognizable in a court of the United States. (Alabama v. Wolffe, 18 Fed. R. 836.)

A corporation (L. C. & C. R. R. Co. v. Letson, 2 Howard, 497 ; Marshall v. B. & O. R. R. Co. 16 Howard, 314 ; Muller v. Dows, 94 U. S. 444 ; Steamship Co. v. Tugman, 106 U. S. 118) and, it has been held, an unincorporated association authorized by statute to give in the name of one of its officers (Fargo v. L. N. A. & C. R. R. Co. 6 Fed. R. 787 ; Maltz v. American Express Co. 3 Central L. J. 784 ; Liverpool Insurance Co. v. Massachusetts, 10 Wallace, 566 ; *contra* Dinsmore v. P. & R. Co. 3 Central L. J. 157) is conclusively presumed to be composed of citizens of the State or nation which chartered it, or from whose laws it derives its powers. A corporation chartered by two or more States is presumed to be a citizen of that one of them within whose limits the suit is brought. (O. & M. R. R. Co. v. Wheeler, 1 Black, 286 ; Railway Co. v. Whitton, 13 Wallace, 270 ; Muller v. Dows, 94 U. S. 444. See Railroad Co. v. Harris, 12 Wallace, 65 ; Graham v. B. H. & E. R. R. Co. 118 U. S. 161 ; Pa. R. R. Co. v. St. L. A. & T. H. R. R. Co. 118 U. S. 290 ; Moore v. C. St. L. P. M. & D. R. R. Co. 21 Fed. R. 817 ; C. St. P. M. & O. R. R. Co. v. Dakota Co. 28 Fed. R. 219.) A municipal corporation is considered to be a citizen of the State within which it is situated. (Cowles v. Mercer County, 7 Wallace, 118.)

If one of the parties sues or is sued as receiver (Davies v. Lathrop, 12 Fed. R. 353 ; Farlow v. Lea, 2 C. L. R. 329) or as an executor or administrator, his own citizenship, not that of those whom he represents, is the test in determining the jurisdiction. (Bonnapee v. Williams, 3 Howard, 574 ; Coal Company v. Blatchford, 11 Wallace,

172 ; Browne v. Browne, 1 Washington, 429.) When an infant sues by his next friend, or special guardian, the citizenship of the infant alone is the test. (Woolridge v. McKenna, 8 Fed. R. 650.) The pleadings must show the jurisdiction or the suit will be dismissed at the court's own motion. (Börs v. Preston, 111 U. S. 252.) The pleading should state affirmatively of what State the parties are citizens, whenever the jurisdiction of an action at common law rests upon that ground ; and in all cases in equity. (Equity Rule 20.) The allegation that a party resides or is domiciled in a designated State is insufficient. (Turner v. Bank of North America, 4 Dallas, 8 ; Evans v. Davenport, 4 McLean, 574 ; Everhart v. Huntsville College, 120 U. S. 223.) In a suit in the Circuit Court for the District of Louisiana, the averment that a party "is now residing in the parish of West Baton Rouge, where the said Pierre Gassies caused himself to be naturalized an American citizen," was held to be a sufficient averment that he was a citizen of Louisiana. (Gassies v. Ballou, 6 Peters, 761.) When alienage is to be averred, the allegation should be that the party is "a citizen and subject" of the foreign State, which should be designated. (Wilson v. City Bank, 13 Sumner, 422.) A consul is not presumed to be a citizen of the State which he represents. (Börs v. Preston, 111 U. S. 252.)

The filing of a declaration of his intention to become a citizen of the United States does not terminate a party's alienage, although he is permitted by the laws of the State of his residence to vote and hold office. (Lanz v. Randall, 4 Dillon, 425 ; Maloy v. Duden, 25 Fed. R. 673.)

"On a change of domicile from one State to another, citizenship may depend upon the intention of the individual. But this intention may be shown more satisfactorily by acts than declarations. An exercise of the right of suffrage is conclusive on the subject ; but acquiring a right of suffrage, accompanied by acts which show a permanent location, unexplained, may be sufficient." (Shelton v. Tiffin, 6 Howard, 163, 185 ; *per* McLean, J.)

"To deprive an American citizen of the right of suing in this court, on the ground of his not being a citizen of any particular State, there ought to be very strong evidence of his being a wanderer without a home." (Thompson, J., in Raband v. D'Wolf, 1 Paine, 580, 588.) The fact that the plaintiff has changed his citizenship for the purpose of bringing the suit in a Federal court does not divert the jurisdiction, if the change has been actually made. (Briggs v. French, 2 Sumner C. C. 251, 255, 256 ; Catlett v. Pacific Insurance Co. 1 Paine, 594. See also Cooper v. Galbraith, 3 Washington C. C. 546,

553–555 ; Case v. Clarke, 5 Mason, 70 ; Robertson v. Carson, 19 Wallace, 94, 106.)

The allegation that a corporation is formed under and created by the laws of a State is sufficient. (Express Co. v. Kountze Brothers, 8 Wallace, 342, 351 ; Steamship Co. v. Tugman, 106 U. S. 118.) An allegation that a party is "a body politic in the law of and doing business in" a certain State is insufficient. (Pennsylvania v. Quicksilver Co. 10 Wallace, 554.)

UNDER GRANTS OF DIFFERENT STATES.

This includes a case where one party claims land under a grant from New Hampshire, and the other under a grant from Vermont, although at the time of the first grant the former was a part of the latter State. (Pawlet v. Clark, 9 Cranch, 292 ; Cobson v. Lewis, 2 Wheaton, 377.)

"It is the grant which passes the legal title to the land, and if the controversy is founded upon the conflicting grants of different States, the judicial power of the courts of the United States extends to the case, whatever may have been the equitable title of the parties prior to the grant." (Cobson v. Lewis, 2 Wheaton, 377, 379, *per* Washington, J.)

ORIGINAL PROCESS OR PROCEEDING.

The words "except as hereinafter provided," which originally concluded this clause, have been repealed. See Section 8 of the Act of 1875 and the notes on the same (*infra*, pp. 49-53).

BUT WHERE THE JURISDICTION IS FOUNDED ONLY ON THE FACT, &c.

The language of this clause is obscure, and leaves it doubtful whether or not it is intended to confer jurisdiction over a suit of the character therein described upon the circuit court held in both districts. This is substituted for the following clause : "Or in which he shall be found at the time of serving such proceeding, except as hereinafter provided." (See Section 8 of Act of 1875, *infra*, p. 49.)

More difficult questions arise as to the jurisdiction over corporations left by the present statute. Can a corporation be sued in another district than that whereof it is an inhabitant ? If so, in what cases ? (See as to this *Ex parte* Schollenberger, 96 U. S. 369 ; St. Clair

v. Cox. 106 U. S. 350, 355–358 ; Boston Electric Co. v. Electric Gas-Light Co. 23 Fed. R. 838 ; United States v. American Bell Telephone Co. 29 Fed. R. 17.) Can a corporation have a residence apart from the State in which it was incorporated ? (That it cannot would seem to be the result of the reasoning in Bank of Augusta v. Earle, 13 Peters, 519 ; Stafford v. American Mills Co. 131 L. J. 310, 314 ; Calcutta Jute Mills Co. v. Nicholson, 1 Ex. D. 428, 445 ; Cook v. Hager, 3 Colorado, 386 ; Cowardin v. Universal Life Ins. Co. 32 Grattan (Va.), 445.)

" All that there is in the legal residence of a corporation in the State of its creation consists in the fact that by its laws the corporators are associated together and allowed to exercise as a body certain functions, with a right of succession in its members. Its officers and agents constitute all that is visible of its existence ; and they may be authorized to act for it without as well as within the State. There would seem, therefore, to be no sound reason why, to the extent of their agency, they should not be equally deemed to represent it in the States for which they are respectively appointed when it is called to legal responsibility for their transactions." (Field, J., in St. Clair v. Cox, 106 U. S. 350, 355.)

The inhabitancy of the defendant need not be alleged in the plaintiff's pleading. This point is a matter of defence, and may, it seems, be waived by the defendant. (Gracie v. Palmer, 8 Wheaton, 699.)

Proceedings under the Inter-State Commerce Act, which was previously passed, were authorized against foreign corporations in circuits where they had agents to accept traffic.

SPECIAL LIMITATION UPON CIRCUIT COURT FOR SOUTHERN DISTRICT OF NEW YORK.

U. S. R. S., § 657, provides that : " The original jurisdiction of the Circuit Court for the Southern District of New York shall not be construed to extend to causes of action arising within the Northern District of said State."

It has been held that this forbids the issue by that court of an injunction to prevent the infringement of a patent when the sole previous cases of infringement occurred in the Northern District of New York. (Hodge v. Hudson River R. R. Co. 6 Blatchford, 85, 87.) This section does not exclude from the jurisdiction of the court causes of action that arise without the State. (Wheeler v. McCormick, 8 Blatchford, 268.) An objection based upon this section is, it has been held, waived unless set up by plea or answer. (Black v. Thorne, 10 Blatchford, 66.)

ANCILLARY LITIGATION.

After a Federal court has acquired jurisdiction through the existence of the necessary difference of citizenship between the original parties, ancillary proceedings may be therein instituted, although parties upon the different sides of the controversy are citizens of the same State and there is no other ground of Federal jurisdiction. (Dunn v. Clarke, 8 Peters, 1 ; Clarke v. Matthewson, 12 Peters, 164 ; Freeman v. Howe, 24 Howard, 450, 460 ; Minnesota Company v. St. Paul Company, 2 Wallace, 609 ; Jones v. Andrews, 10 Wallace, 327 ; Krippendorf v. Hyde, 110 U. S. 276 ; P. R. R. of Mo. v. Mo. P. R. R. 111 U. S. 505, 522 ; Seymour v. Phillips Construction Co. 7 Bissell, 460. But see Christmas v. Russell, 14 Wallace, 69.)

"The question is not whether the proceeding is supplemental and ancillary, or is independent and original in the sense of the rules of equity pleading, but whether it is supplemental and ancillary, or is to be considered entirely new and original, in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the Federal courts from that of the State courts." (Miller, J., in Minnesota Company v. St. Paul Company, 2 Wallace, 609.) Thus, not only can a bill of revivor or a supplemental bill be maintained in a Federal court which had jurisdiction of the original litigation (Clarke v. Matthewson, 12 Peters, 164), but so can a bill to restrain, or to regulate (Dunn v. Clarke, 8 Peters, 1 ; Freeman v. Howe, 24 Howard, 450, 460 ; Jones v. Andrews, 10 Wallace, 327 ; Krippendorf v. Hyde, 110 U. S. 276), or to set aside (P. R. R. of Mo. v. Mo. P. R. R. 111 U. S. 505, 522), or to obtain a judicial construction (Minnesota Company v. St. Paul Company, 2 Wallace, 609), or to enforce a judgment or decree of a Federal court. (Railroad Companies v. Chamberlain, 6 Wallace, 748.)

Conversely, there is a similar limitation upon the jurisdiction of the Federal courts. This is well explained in the following extract from an opinion by Bradley, J. (Barrow v. Hunton, 99 U. S. 80, 81, 82) : "The question presented with regard to the jurisdiction of the circuit court is, whether the proceeding to procure nullity of the former judgment in such a case as the present is or is not in its nature a separate suit, or whether it is a supplementary proceeding, so connected with the original suit as to form an incident to it, and substantially a continuation of it. If the proceeding is merely tantamount to the common law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or

an appeal, it would belong to the latter category, and the United States court could not properly entertain jurisdiction of the case. Otherwise the circuit courts of the United States would become invested with power to control the proceedings in the State courts, or would have appellate jurisdiction over them in all cases where the parties are citizens of different States. Such a result would be totally inadmissible. On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, and, according to the doctrine laid down in Gaines v. Fuentes (92 U. S. 10), the case might be within the cognizance of the Federal courts. The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the State courts ; and in the other class, the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or the party's right to claim any benefit by reason thereof." Proceedings supplementary to execution authorized by State statutes against a judgment debtor or third persons cannot be instituted or removed to the Federal courts, although a creditor's bill may be. (Webber v. Humphries, 5 Dillon, 223 ; Poole v. Thatcherdeft, 19 Fed. R. 49 ; Buford v. Strother, 3 McCrary, 253 ; S. C., 10 Fed. R. 406 ; Flash v. Dillon, 22 Fed. R. 1.) A petition after judgment in a State court for plaintiff in ejectment to have the defendant's damages allowed to him is a mere incident to the ejectment suit, and the Federal courts can take no jurisdiction of it. (Chapman v. Barger, 4 Dillon, 557.)

EFFECT OF STATE STATUTES ON FEDERAL JURISDICTION.

No State statute giving one of its courts—for example, a court of probate—exclusive jurisdiction of a certain class of litigation can impair the jurisdiction of the United States circuit courts. (Suydam v. Broadnax, 14 Peters, 67 ; Union Bank v. Jolly Admir, 18 Howard, 503 ; Hyde v. Stone, 20 Howard, 170 ; Payne v. Hook, 7 Wallace, 425 ; S. C., as Hook v. Payne, 14 Wallace, 452 ; Ellis v. Davis, 109 U. S. 485 ; Hess v. Reynolds, 113 U. S. 73, 77 ; Borer v. Chapman, 119 U. S. 587.) No State statute diminishing or destroying an equitable remedy, or in any way regulating the

practice in courts of equity, has any effect upon the jurisdiction or practice of the Federal courts. (Boyle v. Zacharie, 6 Peters, 648 ; Bein v. Heath, 12 Howard, 168, 179 ; Noonan v. Lee, 2 Black, 499, 509 ; Thompson v. Railroad Companies, 6 Wallace, 134 ; Cowles v. Mercer County, 7 Wallace, 118 ; Payne v. Hook, 7 Wallace, 425 ; Railway Company v. Whittier's Administrator, 13 Wallace, 270, 285 ; Smith v. Railroad Company, 99 U. S. 398.)

Such are statutes requiring a mortgagor to tender the debt secured by his mortgage before filing a bill to redeem the mortgaged premises (Gordon v. Hobart, 2 Sumner, 401) ; requiring a bill to foreclose a mortgage given to secure a judgment to show that execution has been issued under the judgment and returned unsatisfied (Dow v. Chamberlin, 5 McLean, 281) ; requiring leave to be obtained from a State court before a suit can be brought to enforce a judgment therein entered (Phelps v. O'Brien County, 2 Dillon, 518) ; requiring a bond to be given before an injunction can be granted (Bein v. Heath, 12 Howard (U. S.), 168, 178) ; or regulating the form of the security then required or the proceedings to enforce the same (Bein v. Heath, 12 Howard (U. S.), 168 ; Russell v. Farley, 105 U. S. 437 ; Meyers v. Block, 120 U. S. 206, 211) ; authorizing persons to agree upon a statement of facts, and to stipulate that the court take jurisdiction to try a cause and render a decree without pleadings (Nickerson v. A. T. & Santa Fé R. R. Co. 1 McCrary, 383) ; before Equity Rule 92 was promulgated, a State statute authorizing in a foreclosure suit the entry of a decree against the defendant for the amount of any deficiency after the sale (Noonan v. Lee, 2 Black, 499, 509) ; and, at least when the suit is brought in a district not including the State that passed the statute, one that permits a debtor to file a bill to compel the return or cancellation of securities for a usurious debt, without payment or the offer of payment of the amount borrowed with lawful interest. (Matthews v. Warner, 6 Fed. R. 461, 465 ; affirmed without passing on this point, 112 U. S. 600.)

If, however, the customary (Neves v. Scott, 13 Howard (U. S.), 268, 271 ; Gaines v. Fuentes, 92 U. S. 10, 20 ; Ellis v. Davis, 109 U. S. 485 ; Lorman v. Clarke, 2 McLean, 568, 57) or statute law (Clark v. Smith, 13 Peters, 195 ; Fitch v. Creighton, 24 Howard (U. S.), 159 ; Brine v. Insurance Company, 96 U. S. 627 ; Miles v. Scott, 99 U. S. 25 ; Van Norden v. Morton, 99 U. S. 378 ; Cummings v. National Bank, 101 U. S. 153, 157 ; Holland v. Challien, 110 U. S. 115 ; Reynolds v. Crawfordsville National Bank, 112 U. S. 405) of a State has created a new right, the Federal court will

enforce the same at law or equity, if it falls within the remedies authorized by either branch of its jurisdiction.

Such are statutes giving a mortgagor or his judgment creditors a certain time within which to redeem land after a foreclosure sale (Brine v. Insurance Company, 96 U. S. 627 ; Orvis v. Powell, 98 U. S. 176, 178 ; Connecticut Mutual Life Insurance Company v. Cushman, 108 U. S. 51) ; authorizing a suit to set aside the probate of a will or a will itself for fraud (Broderick's Will, 21 Wallace, 503, 519, 520) ; authorizing a person in possession of land and unmolested (Clark v. Smith, 13 Peters, 195), or even one out of possession to sustain a bill to determine and quiet the title to the same (Holland v. Challen, 110 U. S. 15 ; Reynolds v. Crawfordsville National Bank, 112 U. S. 405) ; making an assessment for opening streets a lien upon abutting lands, which can be foreclosed by the city or its assignee (Fitch v. Creighton, 24 Howard (U. S.), 159) ; authorizing an injunction to be granted in a new class of cases (Cummings v. National Bank, 101 U. S. 153, 157) ; empowering a guardian, with the permission of a State court, to mortgage his ward's estate, but not clauses providing that such a mortgage can only be foreclosed in the court which authorized its execution. (Davis v. James, 2 Fed. R. 18.)

STATE STATUTES OF LIMITATION.

At least in cases not founded upon a Federal statute, the courts of the United States, in actions at common law, are bound by State Statutes of Limitation. (U. S. R. S. § 721 ; McClung v. Silliman, 3 Peters, 270 ; Army v. Dubuque, 98 U. S. 470.) A State Statute of Limitation cannot, however, bar the United States. (United States v. Thompson, 98 U. S. 486.)

Federal courts of equity usually follow by analogy State Statutes of Limitation (Wagner v. Baird, 7 Howard, 234, 258 ; Broderick's Will, 21 Wallace, 503 ; Godden v. Kimball, 99 U. S. 201 ; Meath v. Phillips County, 108 U. S. 552 ; Kirby v. L. S. & M. S. R. R. 120 U. S. 130), especially in foreclosure suits (Cleveland Insurance Company v. Reed, 1 Bissell, 180) and suits against executors and administrators (Pulliam v. Pulliam, 10 Fed. R. 53 ; Broderick's Will, 21 Wallace, 503) ; but, at least when their jurisdiction is not concurrent with courts at law (Wagner v. Baird, 7 Howard, 234, 258 ; Godden v. Kimball, 99 U. S. 201), they do not consider themselves bound by them (Kirby v. L. S. & M. S. R. R. 120 U. S. 130, 137 ; Etting v. Marx's Executor, 4 Fed. R. 673) ; and it seems that they never follow them when thereby " manifest wrong and injustice

would be wrought." (Fogg v. St. Louis H. & K. R. R. Co. 17 Fed. R. 871, 873.)

PROPERTY IN THE CUSTODY OF A STATE COURT.

A court of the United States, through a spirit of judicial comity, will usually not interfere with property in the custody of a State court (Hagan v. Lucas, 10 Peters, 400 ; Taylor v. Carryl, 20 Howard, 583 ; Peale v. Phipps, 14 Howard, 368 ; Levi v. Columbia Insurance Company, 1 Fed. R. 206 ; Hubbard v. Bellew, 3 Fed. R. 447 ; Union Mutual Life Ins. Company v. University of Chicago, 6 Fed. R. 443 ; Hutchinson v. Green, 6 Fed. R. 833, 836–839 ; Hamilton v. Chouteau, 6 Fed. R. 339 ; Heidritter v. Elizabeth Oil-cloth Company, 112 U. S. 294. But see Dwight v. Central Vermont R. R. Co. 9 Fed. R. 785), even though such custody was acquired by fraud (Attleborough National Bank v. N. W. Manuf'g & Car Co. 28 Fed. R. 113), provided the fact of such custody be called to its attention before final hearing. (Gilman v. Perkins, 7 Fed. R. 887.) This does not prevent the filing of a bill in equity against an administrator or an executor during the pendency of probate proceedings in a State court (Payne v. Hook, 7 Wallace, 425 ; Yonley v. Lavender, 21 Wallace, 276 ; Chapman v. Borer, 1 Fed. R. 274 ; Hull v. Dills, 19 Fed. R. 657) ; nor the filing of a bill to set aside or stay proceedings upon a judgment in a State court (Barrow v. Hunton, 99 U. S. 80 ; Sahlgard v. Kennedy, 2 Fed. R. 295) ; nor, under the Judiciary Act of 1875, the removal to a Federal court of a suit in equity in the course of which a State court had appointed a receiver (*In re* Iowa and Minnesota Construction Company, 10 Fed. R. 401), or had taken property into its possession under a common law writ. (Kern v. Huidekoper, 103 U. S. 485, 491, 492.) Property is deemed to be in the custody of a court from the time when a suit or action seeking to have it put there has been actually begun, either by levy under a writ in a proceeding *in rem*, or by the filing of a bill praying the appointment of a receiver and the service of process (Taylor v. Carryl, 20 Howard (U. S.), 583 ; Heidritter v. Elizabeth Oil-cloth Company, 112 U. S. 294 ; Levi v. Columbia Insurance Company, 1 Fed. R. 206 ; Hubbard v. Bellew, 3 Fed. R. 447 ; Union Mutual Life Ins. Company v. University of Chicago, 6 Fed R. 443 ; Hutchins v. Green, 6 Fed. R. 339. But see Dwight v. Central Vermont R. R. Co. 9 Fed. R. 785 ; Webb v. Vermont Central R. R. Co. 9 Fed. R. 793 ; Owens v. Ohio Central R. R. Co. 20 Fed. R. 10) ; and it so continues until the clause is practically terminated, although no formal termination is absolutely essential. (Buck

v. Piedmont and Arlington Insurance Company, 4 Fed R. 849; Andrews v. Smith, 5 Fed. R. 833.)

If the suit be first begun in a Federal court, that court will maintain and enforce its right to the custody of the property. (Heidritter v. Elizabeth Oil-cloth Co. 112 U. S. 294.) In one case, where a receiver had been appointed, in a suit begun in a State court, after a bill filed in a Federal court praying relief concerning the same property had been dismissed by a decree, the Federal court subsequently opened the decree, and appointed a receiver of the property upon the filing of a supplemental bill at the same term. (Union Trust Company v. R. R. I. & St. L. R. R. Co. 6 Bissell 197.)

The rules which apply between State and Federal courts also regulate conflicts as to jurisdiction between different Federal courts. (Hurd v. Moiles, 28 Fed. R. 897. But see Wabash Cases, especially Atkins v. W. St. L. & P. R. R. Co. 29 Fed. R. 161; Central Trust Co. v. W. St. L. & P. R. R. Co. 29 Fed. R. 618.)

FOREIGN BILLS OF EXCHANGE.

"The policy which probably dictated this provision in the above section was to prevent frauds upon the jurisdiction of those courts, by pretended assignments of bonds, notes, and bills of exchange strictly inland; and as these evidences of debt generally concern the internal negotiations of the inhabitants of the same State, and would seldom find their way fairly into the hands of persons residing in another State, the prohibition as to them would impose a very trifling restriction, if any, upon the commercial intercourse of the different States with each other. It is quite otherwise as to bills drawn in one State upon another. They answer all the purposes of remittances and of commercial facilities equally with bills drawn upon other countries, or *vice versa;* and if a choice of jurisdictions be important to the credit of bills of the latter class, which it undoubtedly is, it must be equally so to that of the former. Nor does the reason for restraining the transfer of other choses in action apply to bills of exchange of this description, which, from their commercial character, might be expected to pass fairly into the hands of persons residing in the different States of the Union. We conclude, upon the whole, that in no point of view ought they to be considered otherwise than as foreign bills." (Washington, J., in Buckner v. Finley, 2 Peters, 586, 593.)

It has been held, that a check upon a domestic bank is not an inland bill of exchange. (Levy v. Laclede Bank, 18 Fed. R. 193.)

CONTENTS OF ANY PROMISSORY NOTE OR OTHER CHOSE IN ACTION.

The phrase, "contents of a chose in action," is a re-enactment of the language of the Revised Statutes (§ 629), for which the Judiciary Act of 1875 had substituted the phrase, "founded on contract."

"Without doubt, assignable paper, being the *chose in action* most usually transferred, was in the mind of the Legislature when the law was framed; and the words of the provision are therefore best adapted to that class of assignments. But there is no reason to believe that the Legislature were not equally disposed to except from the jurisdiction of the Federal courts those who could sue in virtue of equitable assignments, and those who could sue in virtue of legal assignments."

"The term 'other chose in action' is broad enough to comprehend either case; and the word 'contents' is too ambiguous in its import to restrain that general term. The 'contents' of a note are the sum it shows to be due; and the same may, without much violence to language, be said of an account." (Marshall, C. J., in Sere v. Pitot, 6 Cranch, 332, 335, 336.)

"The term 'chose in action' is one of comprehensive import. It includes the infinite variety of contracts, covenants, and promises which confer on one party a right to recover a personal chattel or a sum of money from another by action." "The complainant in this case [a suit for the foreclosure of a mortgage] is the purchaser and assignee of a sum of money, a debt, a chose in action, not of a tract of land. He seeks to recover by this action a debt assigned to him. He is therefore the 'assignee of a chose in action' within the letter and spirit of the act of Congress under consideration, and cannot support this action in the Circuit Court of the United States where his assignor could not." (Grier, J., in Sheldon v. Sill, 8 Howard, 441, 449, 450; approved, Tredway v. Sanger, 107 U. S. 323, 325; Mersman v. Werges, 112 U. S. 139, 143.) "Under that comprehensive description are included all debts and all claims for damages for breach of contract or for torts connected with contract." (Chase, C. J., in Bushnell v. Kennedy, 9 Wallace, 387, 390.) "The suit is really one for the specific performance of the contracts, to enforce them, to realize the fruits of the rights secured by them to the purchasers, and to reinstate the plaintiff in the position which he is entitled to occupy under the contracts as assignee thereof, notwithstanding any acts done by the county or its officers in impairment of the rights acquired by the contracts. Such a suit must be regarded as one to recover the contents of the contracts. The contents of a contract, as a chose in

action, in the sense of section 629, are the rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit to recover such contents." "The obligation or the promise contained in a contract is its contents, when a suit is brought to enforce such obligation; and it does no violence to language to say that the suit is one to recover such contents." (Blatchford, J., in Corbin v. County of Black Hawk, 105 U. S. 659, 665, 666.)

In a case where the plaintiff sued in replevin to recover property taken by the defendant before the assignment to him, it was said: "It is admitted the assignors in this case could not have maintained the suit in the Federal courts. We are of opinion that this clause of the statute has no application to the case of a suit by the assignee of a chose in action to recover possession of the thing in specie, or damages for its wrongful caption or detention; and that it applies only to cases in which the suit is brought to recover the contents or to enforce the contract contained in the instrument assigned. In the case of a tortious taking, or wrongful detention of a chose in action against the right or title of the assignee, the injury is one to the right of property in the thing, and it is therefore unimportant, as it respects the derivation of the title; it is sufficient if it belongs to the party bringing the suit at the time of the injury. The distinction as it respects the application of the eleventh section of the Judiciary Act to a suit concerning a chose in action is this: Where the suit is brought to enforce the contract, the assignee is disabled unless it might have been brought in the court, if no assignment had been made; but if brought for a tortious taking, or wrongful detention of the chattel, then the remedy accrues to the person who has the right of property or of possession at the time, the same as in case of a like wrong in respect to any other sort of personal chattel. The principle governing the case will be found in cases that have frequently been before us arising out of the assignment of mortgages, where it has been held, if the suit is brought to recover the possession of the mortgaged premises, the assignee may bring the suit in the Federal courts, if a citizen of a State other than that of the tenant in possession, whether the mortgagee could have maintained it or not, within this section; but if brought to enforce the payment or collection of the debt by sale of the premises or by a decree against the mortgagor, then the assignee is disabled, unless the like suit could have been maintained by the mortgagee. (Smith v. Kernochen, 7 Howard, 198.) This distinction is stated by

Mr. Justice Grier in the case of Sheldon *et al.* v. Sill, 8 Howard, 441. The learned justice in delivering the opinion of the court in that case observed 'that the term chose in action is one of comprehensive import. It includes the infinite variety of contracts, covenants, and promises, which confers on one party a right to recover a personal chattel, or sum of money from another by action.' This paragraph has been relied on to sustain the plea in question; but other portions of this opinion will show, that by the phrase 'right to recover a personal chattel' was not meant a recovery in specie, or damages for a tortious injury to the same, but a remedy on the contract for the breach of it, whether the contract was for the payment of money or the delivery of a personal chattel. Indeed, upon a close examination, this is the fair import of the language used, as he was speaking of the contract in the instrument assigned, not of the sale or transfer of it." (Nelson, J., in Deshler v. Dodge, 16 Howard, 622, 631.)

"The case of Young v. Bryan (6 Wheat. Rep. 146) has decided that an endorsee who resides in a different State may sue his immediate endorser residing in the State in which the suit is brought, although that endorser be a resident of the same State with the maker of the note; but in this case the suit is brought against a remote endorser, and the plaintiffs, in their declaration, trace their title through an intermediate endorser without showing that this intermediate endorser could have sustained his action against the defendant in the courts of the United States. The case of Turner v. The Bank of North America (4 Dallas, 8) has decided that this count does not give the court jurisdiction." (Marshall, C. J., in Mollan v. Torrance, 9 Wheaton, 537, 538, 539.)

"It has recently been very strongly argued that the restriction applies only to contracts 'which may be properly said to have contents;' 'not mere naked rights of action founded on some wrongful act, some neglect of duty to which the law attaches damages [as a failure to protect a note, citing Barney v. Globe Bank, 5 Blatchford, 107], but rights of action founded on contracts which contain within themselves some promise or duty to be performed.'" (Chase, C. J., in Bushnell v. Kennedy, 9 Wallace, 387, 391, 392.)

"It is no objection to the jurisdiction, that at some anterior period the transaction assumed a shape not within the reach of that jurisdiction. It is sufficient if it has now become so modified by the act of the parties, or by the principles of law, that jurisdiction now rightfully attaches." (Story, J., in Bean v. Smith, 2 Mason, 252, 269; approved in Ober v. Gallagher, 93 U. S. 199, 206.) A cred-

itor can therefore sue in a Federal court to enforce a judgment recovered by him, although he could not have brought there the suit in which that judgment was recovered. (Bean v. Smith, 2 Mason, 252, 269 ; Ober v. Gallagher, 93 U. S. 199, 206.) A municipal bond in the ordinary form is a "promissory note negotiable by the law merchant." (Ackley School District v. Hall, 113 U. S. 135 ; New Providence v. Halsey, 117 U. S. 336.)

ASSIGNEE.

"The circumstance that the assignment was made by operation of law, and not by the act of the party, might probably take the case out of the policy of the act, but not out of its letter and meaning. The Legislature has made no exception in favor of assignments so made. It is still a suit to recover a *chose in action* in favor of an assignee, which suit could not have been prosecuted if no assignment had been made ; and is therefore within the very terms of the law." (Sere v. Pitot, 6 Cranch, 332, 336, *per* Marshall, C. J.)

"The representatives of a deceased person are not usually designated by the term 'assignees,' and are, therefore, not within the terms of the act." (Marshall, C. J., in Sere v. Pitot, 6 Cranch, 332, 336 ; Chappedelaine v. Dechenaux, 4 Cranch, 306 ; Childress v. Emory, 8 Wheaton, 642.)

Receivers are also not within the terms of the act. (Davies v. Lathrop, 12 Fed. R. 353.)

CORPORATION.

Whether this term applies to public corporations and quasi-corporations, such as cities, counties, villages, and towns, remains to be decided.

APPELLATE JURISDICTION OF CIRCUIT COURTS.

See U. S. R. S., sections 631, 632, 633, 634, 635, and 636.

Sections 587, 601, and 637 provide for the removal of cases from a United States district to a United States circuit court, on account of the disability of a district judge.

SECTION 2 OF JUDICIARY ACT OF 1875 AS AMENDED IN 1887.

"SECTION 2. That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made

under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district; any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein being non-residents of that State; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district.

"And where a suit is now pending, or may be hereafter brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: Provided, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein.

At any time before the trial of any suit which is now pending in any circuit court, or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the circuit court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such State court, it shall cause the same to be remanded thereto. Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

REMOVAL OF CAUSES.

Four important changes are here made in the regulations concerning the removal of causes.

No case can now be removed unless "the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars."

When the sole ground for the removal is the status of the parties to the controversy in litigation—that is, because the United States are plaintiffs or petitioners—or there is a controversary between citizens of different States, "or a controversary between citizens of the same State claiming land under grants of different States, or a controversary between citizens of a State and foreign States, citizens, or subjects," the suit can only be removed by the defendant or defendants when non-residents of the State in which it is brought; except, perhaps, when there is a controversy "wholly between citizens of different States, and which can be fully determined between them." It is doubtful whether this class of cases can be removed by a defendant who is a resident of the State where the suit is brought.

A suit can now be removed from a State court on account of local

prejudice only when a defendant who is a citizen of another State can make it appear to the Circuit Court, "that, from prejudice or local influence, he will not be able to obtain justice in such State court, or in any other State court to which said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause." Formerly the affidavit of any party who was a citizen of another State, alleging "that he has reason to believe and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court," was sufficient to support a removal. (U. S. R. S. § 639, subd. 3.)

No suit can now be removed to a Federal court which could not originally have been brought there, except when the sole objection to the original jurisdiction was the non-residence of the defendant. Formerly, in a number of cases, a suit might be removed to a court in which it could not have originally been brought. (Claflin v. Insurance Companies, 110 U. S. 81, and cases cited.)

An agreement by a corporation not to remove into a Federal court any suit brought against it within a State is void. (Insurance Company v. Morse, 20 Wallace, 445; Barron v. Burnside, 121 U. S. 186.) A State, however, has the power to exclude from its limits any corporation not engaged in interstate or international commerce; and it seems that the courts will not examine into the reasons for such exclusion, provided the statute under which it is made is constitutional. (Paul v. Virginia, 8 Wallace, 168; Doyle v. Continental Life Ins. Co. 94 U. S. 535; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; Phila. Fire Ass'n v. New York, 119 U. S. 110; Barron v. Burnside, 121 U. S. 186.)

A stipulation not to remove a specified suit into a Federal court has been held to be valid. (Hanover National Bank v. Smith, 13 Blatchford, 224.)

MATTER IN DISPUTE.

After a petition and bond for a removal have been filed, the pleading cannot be so amended by a reduction of the amount involved as to defeat the jurisdiction of the circuit court. (Kanouse v. Martin, 15 Howard, 198; Green v. Custard, 23 Howard, 484; Wright v. Wells, 1 Peters, C. C. 220; Roberts v. Nelson, 8 Blatchford, 74.) It has been said that if the amount in dispute when the suit is commenced is sufficient to authorize a removal, no subsequent event can defeat the right to remove. (Roberts v. Nelson, 8 Blatchford, 74.) But there is a ruling at circuit to the contrary (Maine v. Gilman, 11 Fed. R. 214), and it has been held that if, since the commencement of the suit by the service of an answer setting up a

counter-claim or otherwise, the matter in dispute has been increased to the jurisdictional amount, a removal may occur if the suit has not progressed too far. (Clarkson v. Manson, 4 Fed. R. 257 ; McGinnity v. White, 3 Dillon, 350 ; *Contra* F. W. M. Co. v. Broderick, 6 Fed. R. 654 ; and see Carrick v. Landman, 20 Fed. R. 209.)

It seems that the incorporation, by reference to the preceding section, of this limitation excludes from a removal cases where the matter in dispute is the right to personal liberty or to the custody of a child, and is therefore incapable of pecuniary valuation. (Kurtz v. Moffitt, 115 U. S. 487, 498 ; Barry v. Mercein, 5 Howard, 103 ; Pratt v. Fitzhugh, 1 Black, 271 ; De Krafft v. Barney, 2 Black, 704 ; Dillon on Removal of Causes, § 50 (3d ed.), p. 62 ; Phillips' Pr. (2d ed.), 82. But see Lee v. Lee, 8 Peters, 44, 48.)

After a Circuit Court of the United States has once rightfully acquired jurisdiction of a cause by removal or original process, an amendment bringing in new parties or a new cause of action will not ordinarily defeat the jurisdiction. (Ober v. Gallagher, 93 U. S. 199, 206 ; Stewart v. Dunham, 115 U. S. 61, 64).

CONTROVERSY WHICH CAN BE FULLY DETERMINED AS BETWEEN THEM.

"To entitle a party to a removal under this clause there must exist in the suit a separate and distinct cause of action in respect to which all the necessary parties on one side are citizens of different States from those on the other." (Hyde v. Ruble, 104 U. S. 407, 409, *per* Waite, C. J.)

"The rule is now well established that this clause in the section refers only to suits where there exists 'a separate and distinct cause of action, on which a separate and distinct suit might have been brought and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different States from those on the other. To say the least, the case must be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more States on one side, and citizens of other States on the other, which can be fully determined without the presence of the other parties to the suit as it has been begun.' Fraser v. Jennison, 106 U. S. 191, 194." (Ayres v. Wiswall, 112 U. S. 187, 192.)

This is not the case when the defendant who would otherwise be entitled to remove the suit is charged as jointly liable with another defendant, who is a fellow-citizen of the plaintiff. (Hyde v. Ruble, 104 U. S. 407 ; Ayres v. Wiswall, 112 U. S. 187, 193 ; L. & R. R. R. v. Ide, 114 U. S. 52 ; Putnam v. Ingraham, 114 U. S.

57 ; St. L. &c. R. R. v. Wilson, 114 U. S. 60 ; Pirie v. Tvedt, 115 U. S. 41 ; Starin v. New York, 115 U. S. 248 ; Sloane v. Anderson, 117 U. S. 275 ; Fidelity Insurance Co. v. Huntington, 117 U. S. 280 ; Core v. Vinal, 117 U. S. 347 ; Plymouth Mining Co. v. Amador Canal Co. 118 U. S. 265 ; Little v. Giles, 118 U. S. 596 ; Brooks v. Clark, 119 U. S. 502.) It makes no difference that the alleged cause of action is both joint and several either in tort or contract, if the plaintiff sues the defendants jointly (L. & N. R. R. Co. v. Ide, 114 U. S. 52 ; St. L. &c. R. R. v. Wilson, 114 U. S. 60 ; Pirie v. Tvedt, 115 U. S. 41 ; Starin v. New York, 115 U. S. 248 ; Plymouth Mining Co. v. Amador Canal Co. 118 U. S. 265 ; Little v. Giles, 118 U. S. 596 ; Brooks v. Clark, 119 U. S. 502) ; nor that the defendants have filed separate answers (Pirie v. Tvedt, 115 U. S. 41 ; Sloane v. Anderson, 117 U. S. 275, 278) ; nor that one of them has made a default (Putnam v. Ingraham, 114 U. S. 57 ; Brooks v. Clark, 119 U. S. 502) ; nor that judgment has been entered against one of them before the other was served with process. (Brooks v. Clark, 119 U. S. 502.) If it is claimed that defendants were improperly made parties for the sake of preventing a removal, that fact must be proven to the circuit court by the petitioner ; and even then it is extremely doubtful whether it will justify a removal. (Plymouth Mining Co. v. Amador Canal Co. 118 U. S. 264, 270, 271 ; Leather Manufacturers' Bank v. Cooper, 120 U. S. 778, 781.) "A case is not removable because a colorable assignment has been made to give a State court exclusive jurisdiction." (Leather Manufacturers' Bank v. Cooper, 120 U. S. 778, 781, *per* Waite, C. J.)

Where there is but one controversy in the suit, it seems that all the defendants must join in the application for removal ; and that if one of them has lost his right to remove, the other cannot do so, although he has had no previous opportunity. (Fletcher v. Hamlet, 116 U. S. 408 ; H. & T. C. R. Co. v. Shirley, 111 U. S. 358. But see Mutual Life Ins. Co. v. Champlin, 21 Fed. R. 85.)

The removal takes the entire suit, not merely the separate controversy, into the Federal court. (Barney v. Latham, 103 U. S. 205.)

PREJUDICE OR LOCAL INFLUENCE.

A removal on account of prejudice or local influence is analogous to an application in a State court for a change of venue. (Johnson v. Monell, Woolworth, 390, 399, *per* Miller, J.) The decisions upon such applications in the State courts may, therefore, be usefully consulted. (E. G. Zobieskie v. Bander, 1 Caines, 487 ; Baker v. Sleight, 2 Caines, 46 ; N. W. T. R. v. Wilson, 3 Caines, 127 ;

Van Renneselaer v. Douglas, 2 Wendell, 290 ; Bowman v. Ely, 2 Wendell, 250 ; People v. Webb, 1 Hill, 179 ; N. J. Zinc Co. v. Blood, 8 Abb. Pr. 147 ; People v. Wright, 5 How. Pr. (N. Y.) 23 ; Budge v. Northam, 20 How. Pr. (N. Y.) 248 ; People v. L. I. R. R. Co. 16 How. Pr. (N. Y.) 113 ; Shaw v. Hamilton, 10 Indiana, 182 ; Charlotte v. Chouteau, 33 Mo. 194 ; Murray v. N. J. R. R. Co. 23 N. J. L. (3 Zab.) 63 ; Smith v. Hortler, 1 Law Repos. (N. C.) 518 ; Ingersoll v. Wilson, 2 W. Va. 59 ; Ott v. McHenry, 2 W. Va. 73 ; People v. Williams, 24 Cal. 31 ; Millison v. Holmes, 1 Ind. 45 ; T. M. &c. Co. v. Wallers, &c. Co. 4 Nevada, 218. See also Lewis v. Fire Ins. Co. 2 Cranch C. C. 500.)

Mr. Justice Miller said, speaking of the act for which this clause is a substitute (Johnson v. Moncll, Woolworth, 390, 397) : " The act does not in terms prescribe the time at which the citizenship of the moving party must be acquired. Nor is there anything from which to imply that a time was intended to be limited in that regard. Had Congress intended to confine the privileges of the act to parties who were citizens of different States at the commencement of the suit, it would have been very easy so to have provided. It did not see fit so to do. On the other hand, in express terms, or at least by the strongest implication, it provided otherwise. The language is : ' Where a suit is now pending, or may hereafter be brought, in any such court in which there is a controversy between a citizen,' etc., which is as much as to say, Whenever a controversy shall arise in a suit pending in a State court, the parties to which shall at any time be citizens of different States, the cause may be removed. No time at which the citizenship shall be acquired is limited. So the inference is that it may be acquired at any time." (See Miller v. C. B. & Q. R. R. Co. 17 Fed. R. 97 ; Sands v. Smith, 1 Dillon, 290 ; Cook v. Whitney, 3 Woods, 715 ; Hone v. Dillon, 29 Fed. R. 465 ; *Contra* Frelinghuysen v. Baldwin, 19 Fed. R. 49 ; Schnadig v. Flescher, 29 Fed. R. 465.)

The restriction as to suits by assignees does not apply to this clause. (Claflin v. Insurance Companies, 110 U. S. 81, and citations ; Bell v. Noonan, 19 Fed. R. 225.)

The argument of a demurrer is a trial. (Alley v. Nott, 111 U. S. 472 ; Scharf v. Levy, 112 U. S. 711 ; Gregory v. Hartley, 113 U. S. 742. But see Hone v. Dillon, 29 Fed. R. 465.) It has been held that the entry of an order taking a bill *pro confesso* for a failure to appear and answer is not a trial (McHenry v. N. Y. P. & O. R. Co. 25 Fed. R. 65) ; and that the argument of a contested

motion for an injunction and an appeal from the decision is equivalent to a trial. (C. I. & N. P. R. Co. v. M. & N. W. R. Co. 29 Fed. R. 337.) "To bar the right of removal, it must appear that the trial had actually begun and was in progress in the orderly course of proceeding when the application was made. No mere attempt of one party to get himself upon the record as having begun the trial will be enough. The case must be actually on trial by the court, all parties acting in good faith, before the right of removal is gone. (Waite, C. J., in Removal Cases, 100 U. S. 473. See Maloy v. Duden, 25 Fed. R. 673.)

NO APPEAL OR WRIT OF ERROR FROM THE DECISION OF THE CIRCUIT COURT SO REMANDING SHALL BE ALLOWED.

In case of an erroneous omission to remand the cause, the final decision may be reversed by the Supreme Court, even though no motion to remand was made at circuit. (Grace v. Insurance Companies, 109 U. S. 278.)

It seems uncertain whether, under the present practice, upon appeal from the final decision of the State courts, the order of the Federal circuit court remanding the cause can be reviewed. (See U. S. R. S. § 709 ; Kanouse v. Martin, 14 Howard, 23.)

If the Federal court refuses to remand the cause, the State courts have no right to take any further proceedings therein ; and the removing party does not lose his right to a reversal of any such proceedings upon this ground by trying the case upon its merits in the State court. (Insurance Co. v. Dunn, 19 Wallace, 214 ; Removal Cases, 100 U. S. 457 ; National S. S. Co. v. Tugman, 106 U. S. 118 ; C. & O. R. R. Co. v. White, 111 U. S. 134.)

Perhaps the decision of the circuit court remanding a cause may be reviewed in the Supreme Court by an application for a mandamus. (See Insurance Co. v. Comstock, 16 Wallace, 270 ; Railroad Co. v. Wiswall, 23 Wallace, 508 ; Hoadley v. San Francisco, 94 U. S. 4, 5.)

SECTION 3 OF JUDICIARY ACT OF 1875, AS AMENDED IN 1887.

That Section 3 of said Act be, and the same is hereby amended so as to read as follows :

"SECTION 3. That whenever any party entitled to re-

move any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a State court to the Circuit Court of the United States, he may make and file a petition in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the Circuit Court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such Circuit Court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said Circuit Court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit, if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit, and the said copy being entered as aforesaid in said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court; and if in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceed the sum or value of two thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit, if the court require it, that he or they claim, and shall rely upon a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not

be allowed to plead such grant, or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as herein before mentioned in this act, remove the cause for trial to the Circuit Court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim."

PRACTICE ON REMOVAL.

"LAST CLAUSE OF SAID SECTION."

This would seem to refer to the clause authorizing a removal for prejudice or local influence. It leaves the practice in removing a case upon that ground in great uncertainty. It might be held that the fifth paragraph of U. S. R. S., section 639, is still in force, so far as removals for prejudice or local influence are concerned, although the rest of that section is probably repealed. (See observations upon Section 6 of Judiciary Act of 1887, *infra*, p. 56)

It will be prudent when removing cases upon this ground to comply with all the requirements of Section 639 and, except as to the time of removal, with those of Section 3 of the Act of 1887. The affidavit upon which such a removal is sought may be verified by any one acquainted with the facts, although it is the better practice to have it verified by the plaintiff. (Dennis v. County of Alachua, 3 Woods, 683 ; Dillon on Removal of Causes, § 69 (4th ed.), pp. 85–87.) It is well to state in the affidavit, when verified by another, why not made by the party himself. (Dillon on Removal of Causes, § 69 (4th ed.), p. 87.) It is safer practice to state in the affidavit the special facts and circumstances from which the prejudice or local influence is inferred. (Lewis v. Fire Ins. Co. 2 Cranch C. C. 500 ; Kounsalear v. Clarke, 4 Cranch C. C. 98 ; Frank v. Avery, 21 Wisconsin, 166 ; Sloan v. Smith, 3 California, 410 ; Tooms v. Randall, 3 California, 438 ; Kerr v. Whitaker, 3 N. J. L. (2 Pen. 514.) It has been held that the affidavit must be verified in accordance with the laws of the State in which the circuit court is held. (Sutherland v. Jersey City & B. R. Co. 22 Fed. R. 356, 358 ; Bowen v. Chase, 7 Blatchford, 255.)

PETITION FOR REMOVAL.

"Such a petition must state facts sufficient to entitle him to have the transfer made. This cannot be done without showing that the circuit court would have jurisdiction of the suit when transferred. The one necessarily includes the other." (Chase, C. J., in Railway Company v. Ramsey, 22 Wallace, 322, 328.) It must state the facts showing that such a case exists as the statute permits to be removed. A mere general allegation of the language of the statute will be disregarded as a conclusion of law. (Gold Washing, &c. Co. v. Keyes, 96 U. S. 199; Grace v. Insurance Companies, 109 U. S. 278; Carson v. Dunham, 121 U. S. 421.)

"The allegations of the petition for removal are jurisdictional, and they must be positive and certain, because the court cannot well proceed to take jurisdiction of a case and try the same as long as there is any doubt upon the question of jurisdiction." (McCrary, C. J., in Wolff v. Archibald, 14 Fed. R. 369.) It has, therefore, been held that if any of the essential allegations of the petition are alleged upon information and belief it is defective. (Wolff v. Archibald, 14 Fed. R. 369.) When the right to remove rests upon a difference in citizenship, the citizenship of each of the parties should be alleged. (Grace v. Insurance Companies, 109 U. S. 278.) It is insufficient to state their residence. (Grace v. Insurance Companies, 109 U. S. 278.) The petition in all cases not removed on account of prejudice or local influence should show that the difference in citizenship existed both at the time of the commencement of the suit and at the time of the application for removal. (Gibson v. Bruce, 108 U. S. 561; H. & T. R. R. Co. v. Shirley, 111 U. S. 358; Akers v. Akers, 117 U. S. 197.)

If, however, either or both of those facts are alleged with sufficient precision in the pleadings, they need not be restated in the petition. (Bondurant v. Watson, 103 U. S. 281; Steamship Co. v. Tugman, 106 U. S. 118.) The allegation "that said plaintiffs as such executors are citizens of the State of New York" was held insufficient. (Amory v. Amory, 95 U. S. 186. But see Cooke v. Seligman, 7 Fed. R. 263.)

So, when a removal is claimed upon the ground that the suit arises under the Constitution and laws of the United States, the petition must state the facts showing that such is the case, unless those facts appear in pleadings previously filed or served, when such allegations may be incorporated into the petition by reference. (Gold Washing, &c. Co. v. Keyes, 96 U. S. 199, 204; Trafton v. Nougues, 4 Sawyer, 178; Carson v. Dunham, 121 U. S. 421.)

The petition should also show that the matter in dispute is the jurisdictional amount, unless this already appears from the pleadings. (United States v. Pratt Coal & Oil Co. 18 Fed. R. 708 ; Dillon on Removal of Causes, § 70 (4th ed.), p. 115.)

The petition need not be verified. (Sweeney v. Coffin, 1 Dillon, 73 ; Allen v. Ryerson, 2 Dillon, 501 ; Houser v. Clayton, 3 Woods, 273.) It may be signed either by the petitioner or by his attorney in fact or at law. (Dennis v. Alachua County, 3 Woods, 683 ; Wormser v. Dahlman, 16 Blatchford, 319. See also Removal Cases, 100 U. S. 457.)

"A party is not entitled, under existing laws, to file a second petition for the removal upon the same grounds, where, upon the first removal by the same party, the Federal court declined to proceed and remanded the suit, because of his failure to file the required copy within the time fixed by the statute. When the circuit court first remanded the cause—the order to that effect not being superseded—the State court was reinvested with jurisdiction, which could not be defeated by another removal upon the same grounds and by the same party." (Harlan, J., in St. P. & C. R. Co. v. McLean, 108 U. S. 212, 217. See Johnston v. Donvan, 30 Fed. R. 395.)

It has been held at circuit that there is grave doubt as to the power of the circuit court to permit an amendment of the petition, and that an application for that purpose should be denied. (MacNaughton v. S. P. C. R. R. Co. 19 Fed. R. 881 ; Endy v. Commercial Fire Ins. Co. 24 Fed. R. 657.) But the Supreme Court has said that, if the jurisdictional facts are not properly stated, "there is no good reason why an amendment should not be allowed, so that they may be properly stated." (Ayers v. Watson, 113 U. S. 594, 598. See Barclay v. Levee Commissioners, 1 Woods, 254 ; Houser v. Clayton, 3 Woods, 273, 277 ; Woolridge v. McKenna, 8 Fed. R. 650 ; Coburn v. C. V. L. & C. Co. 25 Fed. R. 791.) And the rule has been thus stated :

"If, upon the filing of a petition for removal, the State court grants the prayer of the petition, and the transcript is filed in the United States court ; and, upon a motion to remand being made, some defect in the averments of the petition are discovered—no good reason is perceived why an amendment should not be allowed in order that the averments in the petition may be made to show the very truth of the case. Under such circumstances, the effect of the amendment is to show that the order of the State court was proper, according to the facts. If, however, the State court did not grant or refused an order for the removal of the cause, then a different rule should prevail.

The case having been originally brought in the State court, its jurisdiction has attached, and it cannot be compelled, nor, in fact, is it justified, in parting with jurisdiction, unless the record presented to it shows that the case is properly removable under the law. The right of removal is purely statutory. The State court is in duty bound to retain jurisdiction, unless the party seeking a removal shows upon the record in that court a legal right of removal. If, then, a party seeking a removal does not upon the record make a showing sufficient to terminate the jurisdiction of the State court, and for that reason the State court does not yield up its jurisdiction, can it be permitted to the petitioner to file a transcript in the United States court, and then, in the latter court, file amendments showing that he had a right of removal? The State court is not required to take notice of papers filed or proceedings had in the United States courts. As already said, the State court must retain jurisdiction, and proceed with the cause until, upon its record, it is made to appear that the case is one removable to the United States court. Its jurisdiction cannot be affected by papers filed in the United States courts.

"If a party having in fact the right of removal wishes to exercise the right, he must comply with the statutory requirements. In other words, he must file in the State court a sufficient showing and proper bond. If the showing is incomplete and insufficient, the jurisdiction of the State court continues. If the party by amendment can perfect the showing, he must do so in the State court. He cannot, by filing a transcript in this court, confer the right upon the Federal tribunal of terminating the jurisdiction of the State court by allowing an amendment to be filed in this court." (Shiras, J., in Winnemans v. Edgington, 27 Fed. R. 324, 326.)

In a recent case the Supreme Court held that a subsequent answer might be treated as an amendment to the petition for removal. "As an amendment, the answer was germane to the petition, and did no more than set forth in proper form what had before been imperfectly stated. To that extent, we think, it was proper to amend a petition which, on its face, showed a right to the transfer. Whether this could have been done if the petition, as presented to the State court, had not shown on its face sufficient ground of removal, we do not now decide." (Carson v. Dunham, 121 U. S. 421, 427.)

BOND UPON REMOVAL.

The bond must name a specific sum as the penalty. If the place for the amount of the penalty is left blank, it is insufficient. (Burdick v. Hale, 7 Bissell, 96.) A penalty of $1000 will ordinarily be suffi-

cient when the defendant has not been held to bail. (Blanchard v. Dwight, 12 Wendell, 192.) If the condition is simply that the petitioner will file "copies of all process," it is insufficient. (Burdick v. Hale, 7 Bissell, 96.) The following condition was held to be sufficient: "If the said petitioners shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, and do or cause to be done such other and appropriate acts, as by the acts of Congress approved March 3d, 1875, and other acts of Congress, are required to be done upon the removal of a suit into the United States circuit court from a State court." (Cooke v. Seligman, 7 Fed. R. 263.)

The bond must provide for the payment of costs in case of a remand. (Sheldrick v. Cockcroft, 27 Fed. R. 579; Torrey v. Grant Works, 14 Blatchford, 269. But see Dennis v. County of Alachua, 3 Woods, 683, 688.)

The bond need not be executed by the petitioner, if it have a principal and a sufficient surety. (Stevens v. Richardson, 20 Blatchford, 53; S. C., 9 Fed. R. 191; P. G. &c. Exchange v. W. U. Tel. Co. 16 Fed. R. 289; S. C., 11 Bissell, 568.) When the petitioner is named as principal, it seems that it may be executed in his name by his attorney-at-law. (Dennis v. County of Alachua, 3 Woods, 683, 687.)

A defect in the bond may be cured by amendment, with leave of the court, or a new bond may be filed, if such leave to do so be obtained. (Dennis v. County of Alachua, 3 Woods, 683, 688; Ayers v. Watson, 113 U. S. 594, 598; Coburn v. C. V. L. &c. Co. 25 Fed. R. 791.)

It is customary to procure the approval of the bond by the State court. Whether the Federal court has the power to approve the bond after the State court has disapproved it, or to disapprove it after the State court's approval, is unsettled. (Compare Osgood v. Chicago, &c. R. R. Co. 6 Bissell, 330; Dennis v. County of Alachua, 3 Woods, 683; Cooke v. Seligman, 7 Fed. R. 263; Fisk v. U. P. R. R. Co. 6 Blatchford, 362; Taylor v. Shew, 54 N. Y. 75; Mix v. Andes Insurance Co. 74 N. Y. 53; Stone v. South Carolina, 117 U. S. 430; Carson v. Dunham, 121 U. S. 421.)

It has been held at circuit that "the want of acknowledgment or proof of the execution of the bond was a matter of practice for the

State court to pass upon, and it will not be reviewed by this court after the State court has accepted the bond." (Cooke v. Seligman, 7 Fed. R. 263, 269, *per* Blatchford, J.) Such an objection cannot be raised for the first time in the Supreme Court. (Removal Cases, 100 U. S. 457.)

No order of the State court is essential to the removal. (Kern v. Huidekoper, 103 U. S. 485 ; Insurance Co. v. Dunn, 19 Wallace, 714.)

TIME OF REMOVAL.

The petition and bond may be filed in vacation. (Osgood v. C. D. & V. R. R. Co. 6 Bissell, 330.) If the defendant's time to plead or answer has been extended by consent or order, it seems that the time to remove is likewise extended. (Winberg v. B. C. R. R. & Lumber Co. 29 Fed. R. 721 ; Simonson v. Jordan, 30 Fed. R. 721. But see Pullman Palace Car Co. v. Speck, 113 U. S. 84 ; Murray v. Holden, 2 Fed. R. 740.)

COSTS.

It has been held that the costs secured by the bond when the case is remanded are the docket fee of $20 (Josslyn v. Phillips, 27 Fed. R. 481) ; and, when the case is dismissed for failure to proceed therein, the costs that accrued in the State court up to the time of the removal. (Anonymous, 13 Abbott's New Cases (N. Y.), 54 ; Wolf v. Conn. Mutual Life Ins. Co. 1 Flippin, 377 ; Young v. Merchants' Ins. Co. 29 Fed. R. 273, 276.) But no disbursements can be taxed in the Federal court which were incurred in the State court after the petition and bond were filed. (Young v. Merchants' Ins. Co. 29 Fed. R. 273.)

" For Sec. 2 of Statute as amend '88 see post 653."

SECTION 4 OF JUDICIARY ACT OF 1875.

SECTION 4. That when any suit shall be removed from a State court to a Circuit Court of the United States any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which such suit was commenced ;

And all bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal ;

And all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.

EFFECT OF REMOVAL ON PREVIOUS PROCEEDINGS.

The Act of 1875 (Section 3) provided that upon a removal "any bail that may have been previously taken shall be discharged." This clause is repealed by the Act of 1887, and such bail is now, therefore, a security which remains in force.

A stipulation made before removal will be enforced afterward. (Phelps v. C. C. R. Co. 19 Fed. R. 801.)

It has been held at circuit that, after removal, the Federal court may authorize its marshal to take into his custody property held by the sheriff under a writ of the State court issued before the removal. (Friedman v. Israel, 26 Fed. R. 801. See Dennistoun v. Draper, 5 Blatchford, 336.) A receiver appointed before the removal of the case remains in possession until himself removed, and may be required to account in the Federal court. (Hinckley v. Railroad Co. 100 U. S. 153.)

It has been held at circuit that the Federal court cannot after removal punish a party for his violation before the removal of an order of the State court. (Kirk v. M. D. C. Manuf'g Co. 26 Fed. R. 501. But see W. M. & R. Co. v. Raynor, 7 Bissell, 245.)

An order of the State court for the examination of a party before trial under section 870 of the New York Code of Civil Procedure must be vacated after removal by the Federal court. (*Ex parte* Fisk, 113 U. S. 713.)

SECTION 5 OF JUDICIARY ACT OF 1875 AS AMENDED BY THE JUDICIARY ACT OF 1887.

SECTION 5. That if, in any suit commenced in a circuit court, or removed from a State court to a Circuit Court of the United States, it shall appear to the satisfaction of

said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.

The last paragraph of this section is repealed by Section 6 of the Act of 1887. It is as follows: "But the order of said circuit court dismissing *or remanding* said cause to the State court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be." (See observations under Sub-Section 2 of Section 1, *supra*, page 31.)

The Supreme Court said of the first clause of this section:

"We deem it proper to say that this provision of the Act of 1875 is a salutary one, and that it is the duty of the circuit courts to exercise their power under it in proper cases." "Whether, if a defendant allows a case to go on until judgment has been rendered against him, he can take advantage of the objection on appeal or writ of error, we need not now decide." (Waite, C. J., in Williams v. Nottawa, 104 U. S. 209, 212.) "Neither party has the right, however, without pleading at the proper time and in the proper way, to introduce evidence, the only purpose of which is to make out a case for dismissal. The parties cannot call on the court to go behind the averments of citizenship in the record, except by a plea to the jurisdiction or some other appropriate form of proceeding. The case is not to be tried by the parties as if there was a plea to the jurisdiction, when no such plea has been filed. The evidence must be directed to the issues, and it is only when facts material to the issues show there is no jurisdiction that the court can dismiss the case upon the motion of either party. If in the course of a trial it appears by evidence, which is admissible under the pleadings, and pertinent to the issues joined, that the suit does not really and substantially involve a dispute of which the court has cognizance, or that the parties have been improperly or collusively made or joined for the purpose of creating a cognizable case, the court may stop all further proceedings and dismiss the

suit." "No doubt, if, from any source, the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties, or in any other way, it may at once of its own motion cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition. But the evidence on which the circuit court acts in dismissing the suit must be pertinent either to the issue made by the parties, or to the inquiry instituted by the court; and must appear of record if either party desires to invoke the exercise of the appellate jurisdiction of this court for the review of the order of dismissal (Barry v. Edmunds, 116 U. S. 550). And when the defendant has not so pleaded as to entitle him to object to the jurisdiction, and the objection is taken by the court of its own motion, justice requires that the plaintiff should have an opportunity to be heard upon the motion, and to meet it by appropriate evidence." (Waite, C. J., in Hartog v. Memory, 116 U. S. 588, 590–592. See Davies v. Lathrop, 13 Fed. R. 565.) "It might happen that the judge, on the trial or hearing of a cause, would receive impressions, amounting to a moral certainty, that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But upon such a personal conviction, however strong, he would not be at liberty to act, unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a legal certainty of the conclusion based on them. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction on this account 'shall appear to the satisfaction of said circuit court.'" (Matthews, J., in Barry v. Edmunds, 116 U. S. 550, 559.)

The record must show affirmatively the jurisdiction of the court, or the cause may be dismissed at any time, even upon appeal, whenever the omission is discovered. (Grace v. Insurance Companies, 109 U. S. 278; Börs v. Preston, 111 U. S. 252.) It has been said, however: "For the purposes of this appeal we need not inquire when the circuit court first got jurisdiction of this suit. It is sufficient if it had jurisdiction when the decree appealed from was rendered. As no objections were made by the parties in the progress of the cause to the right of the court to proceed, and the decree when rendered was consented to, it is enough for the purposes of this appeal if the record shows that when the consent was acted on by the court jurisdiction was complete. Consent cannot give the courts of the United States jurisdiction, but it may bind the parties and waive previous errors, if when the court acts jurisdiction has been obtained." (Waite, C. J., in Pacific Railroad v. Ketchum, 101 U. S. 289, 298.)

If it is desired to contradict an allegation in the petition for removal, an answer or a plea in abatement to the petition should be filed in the Federal court. (Clarkhuff v. W. I. & N. R. Co. 26 Fed. R. 465 ; Lacroix v. Lyons, 27 Fed. R. 403 ; Rumsey v. Call, 28 Fed. R. 769 ; Carson v. Dunham, 121 U. S. 421.) When the alleged difference of citizenship is denied, the burden of proof rests on the party who seeks the removal. (Carson v. Dunham, 121 U. S. 421, 425.) All questions of this sort must be tried in the Federal court. (Stone v. South Carolina, 117 U. S. 430.)

When the plaintiff acquired the causes of action, which he sought to enforce solely for the purpose of collection under an agreement to pay back a certain proportion of the net proceeds to his assignors, who could not have sued in a Federal court, it was held that the case should be dismissed. (Farmington v. Pillsbury, 114 U. S. 138 ; Williams v. Nottawa, 104 U. S. 209 ; Bernards Township v. Stebbins, 109 U. S. 341 ; New Providence v. Halsey, 117 U. S. 336 ; Little v. Giles, 118 U. S. 596.)

" To justify a dismissal it must appear that the object was to create a case cognizable under the Act of 1875." (Lanier v. Nash, 121 U. S. 404, 410, *per* Waite, C. J.) When a transfer of the cause of action was evidently made for another purpose, the Federal court retained its jurisdiction. (Lanier v. Nash, 121 U. S. 404.)

When, after all the pleadings are filed in a cause removed to or brought in a Federal court on the claim that it is a case arising under the Constitution and laws of the United States, it appears that the averments upon which the jurisdiction is claimed are immaterial, it is the duty of the court to dismiss or remand the cause. (Robinson v. Anderson, 121 U. S. 522.)

Equity Rule 94 is as follows (104 U. S. ix.) :

" Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees and, if necessary, of the shareholders, and the causes of his failure to obtain such action." (See Hawes v. Oakland, 104 U. S. 450 ; Huntington v. Palmer, 104 U. S. 482 ;

Detroit v. Dean, 106 U. S. 537 ; Greenwood v. Freight Company, 105 U. S. 13 ; Quincy v. Steel, 120 U. S. 241 ; County of Tazewell v. F. L. & Tr. Co. 12 Fed. R. 752.)

This rule has been applied in a recent case as follows :

" The bill in the present case, although verified by oath, is far from complying with the letter or the spirit of this rule. It does not contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, although the allegation on that subject includes a part of the time in which the city of Quincy failed to pay for its gas ; but inasmuch as the sworn allegation in the bill was made on the 18th day of August, 1885, and he there swears that he had been the owner of the stock on which he brings this suit over four years, it is easy to suppose that he acquired this stock after the 11th day of May, 1881, on which day the city by its official action notified the gas company that it repudiated the contract and would no longer be bound by it. And it is not an unreasonable supposition that the gas company, foreseeing litigation which it might be desirable for that company to have carried on in a Federal court, immediately after receiving notice of that resolution had this stock placed in the hands of Mr. Steel for the purpose of securing that object, and though the suit was delayed for two or three years, it was probably because the city continued to pay some part of the demand for the gas furnished by the company. The bill does not contain the allegation expressly prescribed by this rule, that ' the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance.' The allegation of the bill,' that this suit is brought in good faith, and for the collection of, and to compel the collection of, what your orator believes to be a meritorious claim,' is by no means the equivalent of this provision of the rule, for it may very well be understood that the party who is seeking to enforce a debt which he believes to be due is acting in good faith for the purpose of compelling its collection, while he may be well aware that he is imposing upon the court to which he actually resorts a jurisdiction which does not belong to it. The rule also requires that he must set forth with particularity his efforts to secure action on the part of the managing directors or trustees of the corporation of which he is a member, and, if necessary, of the shareholders, and the causes of his failure to obtain such action. In the case before us he seems to have made but a single effort to induce the directors of the gas company to institute a suit against the city to recover the money, and this was by a communication in writing addressed to the board, August 1st, 1885. No copy of that letter is

produced, but it is said that the board of directors laid the communication on the table. No copy of the order of the board upon that subject is produced ; no effort at conversation with any of the directors, or any earnest effort of any kind upon his part to induce the directors to bring the suit is shown in the bill ; no attempt to call the attention of the shareholders to this matter during the four years in which he said he was a shareholder, and during which time the city was failing to pay its debt to the gas company, nor any effort at any of the meetings of the shareholders or of the directors to induce them to enforce the rights of the company against the city, is shown. The most meagre description possible of a bare demand in writing, made sixteen days before the institution of this suit, is all we have of the efforts which he should have made to induce this corporation to assert its rights. This letter was addressed to the board of directors, August 1st, 1885, from what point is not stated, but it may reasonably be inferred that it was from Alabama, of which State he was a citizen. The bill itself is sworn to the 13th day of August thereafter. How long a time was left for the consideration of this question by the board of directors, and what earnest efforts Mr. Steel may have made to induce their favorable action, may be easily inferred from the speed with which the bill was sworn to in Alabama and filed after he addressed his letter to the board. The inference that the whole of this proceeding was a preconcerted and simulated arrangement to foist upon the circuit court of the United States jurisdiction in a case which did not fairly belong to it, is very strong." (Miller, J., in Quincy v. Steel, 120 U. S. 241, 246, 247.)

When the bill shows "a condition of things touching the control of the corporate affairs by those intrusted with their active management as would have rendered such a formal application an idle ceremony," and irreparable injury might result from the delay in suing, an omission to allege a formal application to the board of directors will not make the bill fatally defective. (County of Tazewell v. F. L. & Tr. Co. 12 Fed. R. 752.)

SECTION 6 OF JUDICIARY ACT OF 1875.

SECTION 6. That the Circuit Court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally

commenced in said circuit court, and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said State court prior to its removal.

PRACTICE AFTER REMOVAL.

If the suit in the State court is in its nature an action at common law, no repleader is necessary after the removal. (Dart v. McKinney, 9 Blatchford, 359 ; Merchants', &c. National Bank v. Wheeler, 13 Blatchford, 218 ; Bills v. N. O. &c. R. R. Co. 13 Blatchford, 227.) "Nor is a repleader necessary in equity causes where the complaint or petition in the State court contains the substance of a bill in equity adopted to present the plaintiff's case. But although a repleader in such a case be not indispensable, it may often be advisable." (Dillon on Removal of Causes, § 47 (4th ed.), p. 76.) "Where the suit in the State court unites legal and equitable grounds of relief or of defence, as authorized by the statutes of the State, it may, in the Federal court, be recast into two cases, one at law and one in equity, and in such a case a repleader is necessary." (Perkins v. Hendryx, 23 Fed. R. 418 ; Lacroix v. Lyons, 27 Fed. R. 403 ; La Mothe Manuf'g Co. v. National Co. 15 Blatchford, 432 ; Phelps v. Elliott, 26 Fed. R. 881.) If no such repleader is had, so much of the pleadings as present matters not cognizable on that side of the court to which the cause is removed must be stricken out, without prejudice to its presentation in a new suit. (Hurt v. Hollingsworth, 100 U. S. 100 ; Lacroix v. Lyons, 27 Fed. R. 403.)

When the plaintiff proceeds after removal upon the wrong side of the court, the proper practice is to sustain a demurrer to his pleading, without prejudice to his right to replead on the other side of the court. (Perkins v. Hendryx, 23 Fed. R. 418, 419. But see Pilla v. German School Ass'n, 23 Fed. R. 700, 703.)

If the suit is of an equitable nature, the defendant's right to plead does not expire till the second rule-day after his appearance, although his answer was due when the petition for a removal was filed. (Webster v. Crothers, 1 Dillon, 301.)

"It is not understood, however, that a prayer for such relief as a court of law can give at the end of a statement of a cause of action makes it an action at law, but that the grounds of action should be such as a court of law can proceed upon to judgment." (Phelps v. Elliott, 26 Fed. R. 881, 883, *per* Wheeler, J.)

It seems that the filing of a petition and bond for removal, if not

accompanied by a general appearance, does not prevent a motion in the Federal court to set aside the service of the process and dismiss the suit for want of jurisdiction of the person. (Hendrickson v. C. R. I. & P. R. R. Co. 22 Fed. R. 569 ; Kauffman v. Kennedy, 25 Fed. R. 785. But see Sayles v. N. W. Ins. Co. 2 Curtis, 212 ; Edwards v. Conn. Mutual Life Ins. Co. 20 Fed. R. 452.)

It was held, under the Act of 1875, that, when a defendant was properly within the jurisdiction of the State court, he could not after the removal have the suit dismissed upon the ground that he was not served within that Federal district. (Friezen v. Allemania Fire Ins. Co. 30 Fed. R. 349.)

" Wherever there is a total absence of jurisdiction over the subject-matter in the State court, so that it had no power to entertain the suit in which the controversy was sought to be litigated in its then existing or any other form, there can be no jurisdiction in the Federal court to entertain it on removal, although in some other form it would have plenary jurisdiction over the case made between the parties." (Fidelity Trust Co. v. Gill Car Co. 25 Fed. R. 737, 739, *per* Hammond, J. Same point, Hummel v. Moore, 25 Fed. R. 380 ; Sutro v. Simpson, 14 Fed. R. 370 ; *Contra* Kelly v. Va. P. Ins. Co. 3 Hughes, 449.)

If after amendment the pleadings do not allege the jurisdictional facts, the suit will not be dismissed if they appear in the petition for the removal. (Briges v. Sperry, 95 U. S. 401.)

The decisions of the State court made in the case before its removal will ordinarily be followed by the Circuit Court. (Bryant v. Thompson, 27 Fed. R. 881 ; Loomis v. Carrington, 18 Fed. R. 97 ; Duncan v. Gegan, 101 U. S. 810 ; Milligan v. L. & G. M'f'g Co. 21 Blatchford, 407 ; Bushnell v. Kennedy, 9 Wall. 387 ; Fisk v. U. P. R. R. Co. 6 Blatchford, 362 ; Davis v. St. L. & S. F. R. R. Co. 25 Fed. R. 786. But see Spring Co. v. Knowlton 103 U. S. 49.) If it is desired to renew a motion which the State court has denied, " leave to make the application should first be applied for and obtained." (Carrington v. Florida R. R. Co. 9 Blatchford, 468.) " The removal of a case from a State to a Federal court means no appeal. It is simply a change of venue." (Davis v. St. L. & S. F. R. R. Co. 25 Fed. R. 786.) When, however, at the time of a removal a motion was pending to resettle an order previously made, the Circuit Court entertained the application, though it refused to review the decision upon which that order had been entered. (Milligan v. L. & G. Manuf'g Co. 17 Fed. R. 465.)

The successful party is entitled to recover not only the costs of the

proceedings in the Federal courts, but also those which accrued in the State court before the removal. (Anonymous, 13 Abbott's N. C. (U. S. C. C. S. D. N. Y.) 54.)

SECTION 7 OF JUDICIARY ACT OF 1875.

SECTION 7. That in all causes removable under this act, if the term of the circuit court to which the same is removable, then next to be holden, shall commence within twenty days after filing the petition and bond in the State court for its removal, then he or they who apply to remove the same shall have twenty days from such application to file said copy of record in said circuit court and enter appearance therein; and if done within said twenty days, such filing and appearance shall be taken to satisfy the said bond in that behalf;

That if the clerk of the State court in which any such cause shall be pending shall refuse to any one or more of the parties or persons applying to remove the same a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall be deemed guilty of a misdemeanor, and, on conviction thereof in the Circuit Court of the United States to which said action or proceeding was removed, shall be punished by imprisonment not more than one year, or by fine not exceeding one thousand dollars, or both, in the discretion of the court.

And the circuit court to which any cause shall be removable under this act shall have power to issue a writ of certiorari to said State court, commanding said State court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this act for the removal of the same, and enforce said writ according to law;

And if it shall be impossible for the parties or persons removing any cause under this act, or complying with the provisions for the removal thereof, to obtain such

copy, for the reason that the clerk of said State court refuses to furnish a copy, on payment of legal fees, or for any other reason, the circuit court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty as aforesaid, to file a copy of the paper or proceeding by which the same was commenced within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding;

But if said order shall be complied with, then said circuit court shall require the other party to plead, and said action or proceeding shall proceed to final judgment; and the said circuit court may make an order requiring the parties thereto to plead *de novo;* and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid.

FILING OF RECORD.

It has been held that "the failure to file a copy of the record on or before the first day of the succeeding session of the Federal court does not deprive that court of jurisdiction to proceed in the action, and that whether it should do so or not upon the filing of such copy is for it to determine." (St. P. & C. R. R. Co. v. McLean, 108 U. S. 212, 216, *per* Harlan, J.; Railroad Company v. Koontz, 104 U. S. 5; Bright v. Milwaukee R. R. Co. 14 Blatchford, 214; Winchell v. Coney, 27 Fed. R. 482; Rowell v. Hill, 28 Fed. R. 433; McGregor v. McGillis, 30 Fed. R. 388.)

"Undoubtedly promptness should be insisted on by the courts of the United States, and no excuse should be accepted for delay in entering a record after removal, unless it amounts to a clear justification or a waiver by the opposite party. It seems to us manifest that if the petitioning party is forced by his adversary to remain in the State court until he can, in a proper way, secure a reversal of the order which keeps him there, the requirement of the law for entering the record in the circuit court at any time before the reversal actually takes place must be deemed to have been waived, and that for all the purposes of procedure in that court the time when the State court lets go its jurisdiction may be taken as the time according to which

the docketing of the cause is to take place." (Railroad Co. v. Koontz, 104 U. S. 5, 17, 18, *per* Waite, C. J.)

A deposition on file in the State court is considered a part of the record which must be filed. (Miller v. Tobin, 18 Fed. R. 609.) The pleadings are part of the necessary record. (McBratney v. Usher, 1 Dillon, 367.)

When the circuit court is held at different places in the district, the record must be filed in the clerk's office at that place where the suit is originally pending, or in the nearest or most convenient place to that where such a court is held. (Cobb v. Globe Mutual Ins. Co. 3 Hughes, 452.)

It has been held that before the first day of the term next following the removal, either party may upon notice obtain leave to file the record, and that after the record is filed on leave thus obtained, the Federal court has jurisdiction to grant a provisional remedy (Mahoney Mining Co. v. Bennett, 4 Sawyer, 289 ; C. & S. Bank of San José v. Corbett, 5 Sawyer, 172) ; but that the cause cannot be heard and determined until after the time specified in the bond has expired. (Matter of B. & M. R. R. Co. 2 McCrary, 216.)

SECTION 8 OF JUDICIARY ACT OF 1875.

SECTION 8. That when in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be ;

Or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct not less than once a week for six consecutive weeks;

And in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district;

But said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit, and under the jurisdiction of the court therein within such district;

And when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same State, said suit may be brought in either district in said State:

Provided, however, That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem best; and thereupon said suit shall be proceeded with to final judgment according to law.

SERVICE WITHOUT THE STATE OR BY PUBLICATION.

The following rulings have been made upon the construction of this and of Section 738 of the Revised Statutes, which preceded it:

An absent judgment debtor may thus be served in a suit to

sequester his assets. (Brigham v. Luddington, 12 Blatchford, 237. Compare Picquet v. Swan, 5 Mason, 35 ; S. C., 5 Mason, 561.) A claim to a certain number of undesignated shares of stock in a corporation chartered within the district is not property there within the meaning of the statute, when the holder of the legal title to the stock is domiciled elsewhere. (Kilgour v. N. O. Gas-Light Co. 2 Woods, 144.)

Personal service of the order must be made in all cases where the residence of the absent defendant is known or can be ascertained, and service upon him can be made within a reasonable time and by the exercise of reasonable diligence. (Bronson v. Keokuk, 2 Dillon, 498.) Service by publication should only be authorized upon proof by affidavit of the facts showing that personal service without the jurisdiction is impracticable (Bronson v. Keokuk, 2 Dillon, 498), or upon the return of the marshal that the defendant cannot be found within the district. (Forsyth v. Pierson, 9 Fed. R. 801, 803.) When the absent defendant resides in another district of the United States, the safer practice is to obtain an order directing the marshal of that district to serve him (Bronson v. Keokuk, 2 Dillon, 498. See Forsyth v. Pierson, 9 Fed. R. 801) ; but an order authorizing such service is, it seems, not indispensable. (Forsyth v. Pierson, 9 Fed. R. 801, 803.)

The day designated for the defendant's appearance need not be one of the regular rule-days of the court. (Forsyth v. Pierson, 9 Fed. R. 801, 803.) The time within which a bill of review for errors apparent upon the record can be filed to a decree entered in pursuance of the statutory provision does not begin to run till one year after its entry. (Beach v. Mosgrove, 16 Fed. R. 305.)

SUBSTITUTED SERVICE.

Apart from the authority conferred by the foregoing statute, the Federal courts of equity have the inherent power to authorize substituted service in certain kinds of ancillary litigation. This power is recognized by the use of the phrase "original process" in the amendment to so much of Section 1 of the Act of 1875 as restricts the jurisdiction over persons of the Circuit Courts. (Cortes Co. v. Thannhauser, 9 Fed. R. 226.) Such service is made by order of the court upon the attorney who has appeared for an absent party in litigation, to which the new suit is ancillary. (P. R. R. of Mo. v. Mo. P. R. R. Co. 3 Fed. R. 772 ; S. C., 1 McCrary, 647.) When service upon

the attorney is made before any such order has been obtained, it may be set aside. (P. R. R. of Mo. v. Mo. P. R. R. Co. 3 Fed. R. 772 ; S. C., 1 McCrary, 647.) The application for such an order may ordinarily be made *ex parte*. (Daniell's Ch. Pr. (2d Am. ed.) 503.) It must be supported by an affidavit setting forth the reasons why such service is necessary and verifying the allegations of the bill. (P. R. R. of Mo. v. Mo. P. R. R. Co. 3 Fed. R. 772 ; S. C., 1 McCrary, 647 ; Delancy v. Wallis, 3 Brown's C. C. 12 ; Stephen v. Cini, 4 Vesey, 359 ; Kenworthy v. Accunor, 3 Maddock, 550.) A previous request to the attorney and his refusal to accept such service are not essential preliminaries to such a motion. (French v. Roe, 13 Vesey, 593.) "It may be proper" for the order authorizing service upon the attorney "to cause an additional and direct notice to be served on the plaintiff in the suit at law personally, if that is feasible." (Blatchford, J., in Cortes Co. v. Thannhauser, 9 Fed. R. 226, 228.)

Such substituted service will be allowed when a bill is filed to stay proceedings on the common law side of the same court (Cortes Company v. Thannhauser, 9 Fed. R. 226 ; Crellin v. Ely, 13 Fed. R. 420 ; Bartlett v. Sultan of Turkey, 19 Fed. R. 346 ; Read v. Consequa, 4 Washington, 174 ; Eckert v. Bauert, 4 Washington, 370 ; Ward v. Seabry, 4 Washington, 426 ; Hitner v. Suckley, 2 Washington, 465) ; when a bill is filed seeking a new trial of an action on the same court. (Oglesby v. Attrill, 12 Fed. R. 227 ; S. C., 14 Fed. R. 214.) But not upon a bill to set aside a sale made under a decree of the same court when persons are joined as defendants who were not parties to the former suit. (P. R. R. of Mo. v. Mo. P. R. R. Co. 3 Fed. R. 772 ; S. C., 1 McCrary, 647 ; S. C., on appeal, 111 U. S. 505, 522.) Nor upon a bill by a receiver to set aside papers which are in the hands of an attorney for collection when the absent defendants were not parties to the suit in which the receiver was appointed. (Bowen v. Christian, 16 Fed. R. 729.) Nor upon a bill of interpleader. (Herndon v. Ridgway, 17 Howard, 424.) Nor upon a cross-bill. (Sawyer v. Gill, 3 W. & M. 97 ; Segee v. Thomas, 3 Blatchford, 11 ; Hitner v. Suckley, 2 Washington, 465 ; Rubber Co. v. Goodyear, 9 Wallace, 807 ; Heath v. Erie Railway Co. 9 Blatchford, 316.) The proper practice, when the original complainant is absent and refuses to enter his appearance upon a cross-bill, is to procure an order staying his proceedings in the original cause until he answers the cross-bill. (Sawyer v. Gill, 3 W. & M. 97 ; Segee v. Thomas, 3 Blatchford, 11 ; Hitner v. Suckley, 2 Washington, 465.)

SECTION 9 OF JUDICIARY ACT OF 1875.

SECTION 9. That whenever either party to a final judgment or decree which has been or shall be rendered in any circuit court has died or shall die before the time allowed for taking an appeal or bringing a writ of error has expired, it shall not be necessary to revive the suit by any formal proceedings aforesaid.

The representative of such deceased party may file in the office of the clerk of such circuit court a duly certified copy of his appointment, and thereupon may enter an appeal or bring writ of error as the party he represents might have done.

If the party in whose favor such judgment or decree is rendered has died before appeal taken or writ of error brought, notice to his representatives shall be given from the Supreme Court, as provided in case of the death of the party after appeal taken or writ of error brought.

SECTION 10 OF JUDICIARY OF 1875.

SECTION 10. That all acts and parts of acts in conflict with the provisions of this act are hereby repealed.

The decisions upon the foregoing Section of the Act of 1875 are cited under the corresponding repealing Section of the Act of 1887, Section 6, *infra*, page 56.

SECTION 2 OF JUDICIARY ACT OF 1887.

SECTION 2. That whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or

manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding three thousand dollars or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

This section is aimed specially at receivers of railway and telegraph companies. Compare W. U. Tel. Co. v. A. &c. Tel. Co. 7 Bissell, 367.

SECTION 3 OF JUDICIARY ACT OF 1887.

SECTION 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.

SUITS AGAINST RECEIVERS.

For the former practice and a description of the abuses which it sanctioned, see Barton v. Barbour, 104 U. S. 126; especially the dissenting opinion of Mr. Justice Miller.

Compare with the last clause of this Section U. S. R. S., Section 720: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction shall be authorized by any law relating to proceedings in bankruptcy;" and P. & N. Y. S. S. Co. v. Hill Manuf'g Co. 109 U. S. 578, 600.

SECTION 4 OF JUDICIARY ACT OF 1887.

SECTION 4. That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.

The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.

(See Leather Manufacturers' Bank v. Cooper, 120 U. S. 778.)

The location of a national bank must be designated in its certificate of organization. (U. S. R. S. § 5190.)

Compare with the last clause of this section U. S. R. S., Sections 5237 and 5239.

SECTION 5 OF JUDICIARY ACT OF 1887.

SECTION 5. That nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned either in sections six hundred and forty-one, or in six hundred and forty-two, or in six hundred and forty-three, or in seven hundred and twenty-two, or in title twenty-four of the Revised Statutes of the United States, or mentioned in section eight of the Act of Congress of which this act is an amendment, or in the Act of Congress, approved March first, eighteen hundred and seventy-five, entitled "An act to protect all citizens in their civil or legal rights."

U. S. R. S., Sections 641, 642, 722, and Title XXIV. apply to persons denied those civil rights which are secured to them by the Fourteenth Amendment.

Section 643 regulates removals of civil suits and criminal proceedings against revenue officers and their subordinates.

For the constitutionality of these acts, see Tennessee v. Davis, 100 U. S. 257 ; Strauder v. West Virginia, 100 U. S. 303 ; Virginia v. Rives, 100 U. S. 313 ; Civil Rights Cases, 109 U. S. 3 ; *Ex parte* Yarbrough, 110 U. S. 651 ; United States v. Waddell, 112 U. S. 76. For their construction, see the same cases and Baldwin v. Franks, 120 U. S. 678.

SECTION 6 OF JUDICIARY ACT OF 1887.

SECTION 6. That the last paragraph of section five of the Act of Congress, approved March third, eighteen hundred and seventy-five, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," and section six hundred and forty of the Revised Statutes, and all laws and parts of laws in conflict with the provisions of this act be, and the same are hereby repealed: Provided, That this act shall not affect the jurisdiction over or disposition of any suit removed from the court of any State, or suit commenced in any court of the United States, before the passage hereof, except as otherwise expressly provided in this act.

"In 1875 the subject of removals seems to have been brought to the attention of Congress, and the act of that year passed. Many important new provisions were introduced, and the act was evidently intended as a substitute for much that had been enacted before." "While repeals by implication are not favored, it is well settled that where two acts are not in all respects repugnant, if the latter act covers the whole subject of the earlier, and embraces new provisions which plainly show that it was intended as a substitute for the first, it will operate as a repeal." (Waite, C. J., in King v. Cornell, 106 U. S. 395, 396, 397.) Accordingly it was held that the Act of 1875 repealed the first two subdivisions of U. S. R. S., Section 639 (Hyde v. Ruble, 104 U. S. 407 ; King v. Cornell, 106 U. S. 397 ; Holland v. Chambers, 110 U. S. 60), but that it did not repeal the third subdivision of that Section, inasmuch as it did not provide for removals on account of prejudice or local influence in a State court.

(Bible Society v. Grove, 101 U. S. 610 ; Hess v. Reynolds, 113 U. S. 73, 80 ; B. & O. R. R. v. Bates, 119 U. S. 467.) As such removals are now regulated by Section 2 of the Act of 1887, the third subdivision of Section 639 may now be considered as repealed. Whether the two succeeding paragraphs of Section 639 are still in force is a matter for subsequent judicial construction. They certainly are except as regards removals for prejudice or local influence. They are as follows :

" In order to such removal, the petitioner in the cases aforesaid must, at the time of filing his petition therefor, offer in said State court good and sufficient surety for his entering in such circuit court, on the first day of its session, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the cause or in said cases where a citizen of the State in which the suit is brought is a defendant, copies of all process, pleadings, depositions, testimony, and other proceedings in the cause concerning or affecting the petitioner, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein. It shall thereupon be the duty of the State court to accept the surety and to proceed no farther in the cause against the petitioner, and any bail that shall have been originally taken shall be discharged.

" When the said copies are entered as aforesaid in the circuit court the cause shall then proceed in the same manner as if it had been brought there by original process ; and the copies of pleadings shall have the same force and effect, in every respect and for every purpose, as the original pleadings would have had by the laws and practice of the courts of such State if the cause had remained in the State court."

How much of U. S. R. S., Section 629, is repealed by the Acts of 1875 and 1887 is still an open question. If the ninth subdivision, giving circuit courts of the United States jurisdiction " of all suits at law or in equity arising under the patent and copyright laws of the United States," is thereby repealed, the value of the patent or copyright, or of the damages for its infringement, must exceed $2000 to give the circuit courts jurisdiction of a case affecting it. A further question will then arise for adjudication. Have the State courts jurisdiction over such cases in which the value of the matter in dispute is less ? The ground on which the New York courts refused to entertain patent cases was that the Federal statutes had given the Federal courts full jurisdiction over all of them, and had intended that such jurisdiction should be exclusive. (Dudley v. Mayhew, 3 N. Y. 9 ; Hovey v. Rubber Tip Pencil Co. 57 N. Y. 123.)

This act expressly provides for the remand in certain cases of suits pending at the time of its enactment which had been previously removed on account of prejudice or local influence. (Act of 1887, § 1, Sub-Section 2, *supra*, p. 26.)

SECTION 7 OF JUDICIARY ACT OF 1887.

SECTION 7. That no person related to any justice or judge of any court of the United States by affinity or consanguinity, within the degree of first cousin, shall hereafter be appointed by such court or judge to or employed by such court or judge in any office or duty in any court of which such justice or judge may be a member.

"Consanguinity, or kindred, is defined by the writers on these subjects to be '*vinculum personarum ab eodem stipite descendentium*,' the connection or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal or collateral." (2 Blackstone's Commentaries, 202.) Affinity is "relation by marriage." (1 Blackstone's Commentaries, 434.)

First cousins are cousins german, the children of an uncle or aunt. (*In re* Parker, 15 Ch. D. 528, 536; Stoddart v. Nelson, 6 D. M. & G. 68, 72.) The descendants of first cousins are not included. (Sanderson v. Bayley, 4 My. & Cr. 56.)

It has been held to be improper for a receiver to employ as counsel a relative who had previously practised elsewhere and who had come into the circuit apparently for the sole purpose of acting as counsel for the receiver. (Blair v. St. L. H. & K. R. Co. 20 Fed. R. 348.)

ENGLISH PRACTICE.

It is said of Lord Ellenborough, Chief Justice of England, that hearing, while riding in Hyde Park, of the death of the Chief Clerk of the King's Bench, he was unwilling to postpone the appointment of a successor, through fear lest he might die before reaching home; and accordingly dismounted at the nearest house, where he executed a deed, appointing his son to the vacant place. The profits of the office were afterward commuted at £7000 a year. It is said, also, that when this son, the second Lord Ellenborough, was afterward asked

by a Committee of Parliament, whether he did not think that a reduction of these emoluments might reasonably be made, he answered that it was a settled rule of practice to make no reduction in the fees attached to an office without a corresponding reduction of the duties of the incumbent, and that as there were no duties attached to his clerkship, it would be improper to diminish his fees." (See Campbell's Lives of the Chief Justices, Ch. 51, note.)

"An incredible amount of jobbery and nepotism is still practised by some of the Judges. They have many good things in their gift, and if one looks through the list of legal officials, one finds a suspicious number of names well known in connection with the profession. Mr. Richard Denman, who died recently, was appointed Clerk of Assize for the Home Circuit many years ago by his father, the Lord Chief Justice, the salary being £1000 a year. I do not know to whom the office fell on Mr. Denman's death, but his successor is his near relative, Mr. Arthur Denman, who was called to the bar less than six years ago, and who is utterly unknown in his professional capacity. Surely, nobody would attempt to make out that Mr. Denman was the best possible person to select for so snug a berth. The appointment seems to be a job of the most flagrant kind." (London *Truth* for May 12th, 1887.)

Addendum Act 1889, 25 Stat. 855 at Large
" Act 1891, 26 Stat. 209 "
" Act 1890, 26 Stat. 131 "
" Act 1887, 24 Stats, 379 "

RULES OF PRACTICE

FOR THE

COURTS OF EQUITY OF THE UNITED STATES.

IN FORCE JULY 1ST, 1887.

PRELIMINARY REGULATIONS.

1.

The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings; for issuing and returning mesne and final process and commissions; and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to hearing of all causes upon their merits.

2.

The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings, which are grantable of course and applied for, or had by the parties, or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

3.

Any judge of the circuit court, as well in vacation as in term, may, at chambers, or on the rule-days at the clerk's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the circuit court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary, at the next rule-day thereafter, unless some other time is assigned by the judge for the hearing.

4.

All motions, rules, orders, and other proceedings, made and directed at chambers, or on rule-days at the clerk's office, whether special or of course, shall be entered by the clerk in

an order-book, to be kept at the clerk's office, on the day when they are made and directed ; which book shall be open at all office-hours to the free inspection of the parties in any suit in equity, and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order-book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the circuit court may, by rule, abridge the time for notice of rules, orders, or other proceedings not requiring personal service on the parties, in their discretion.

5.

All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees for filing bills, answers, pleas, demurrers, and other pleadings ; for making amendments to bills and answers ; for taking bills *pro confesso ;* for filing exceptions ; and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court or of any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown.

6.

All motions for rules or orders and other proceedings, which are not grantable of course or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule-day, and entered in the order-book, and shall be heard at the rule-day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted, as if not objected to, or refused, in his discretion.

PROCESS.

7.

The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require

the defendant to appear and answer the exigency of the bill; and, unless otherwise provided in these rules, or specially ordered by the circuit court, a writ of attachment, and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

8.

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the circuit court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

9.

When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

10.

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party in the cause.

SERVICE OF PROCESS.

11.

No process of subpoena shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

12.

Whenever a bill is filed, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule-day, or the next rule-day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise, the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpoena against all the defendants.

13.

The service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family.

14.

Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, *toties quoties*, against such defendant, if he shall require it, until due service is made.

15.

The service of all process, mesne and final, shall be by the marshal of the district or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

16.

Upon the return of the subpoena as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

APPEARANCE.

17.

The appearance-day of the defendant shall be the rule-day to which the subpoena is made returnable, provided he has been served with the process twenty days before that day; otherwise his appearance-day shall be the next rule-day succeeding the rule-day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order-book on the day thereof by the clerk.

BILLS TAKEN PRO CONFESSO.

18.

It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer, or answer to the bill, in the clerk's office, on the rule-day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order (as of course) in the order-book, that the bill be taken *pro confesso;* and thereupon the cause shall be proceeded in *ex parte,* and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

19.

When the bill is taken *pro confesso* the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso,* and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown, upon motion and affidavit of the defendant. And no such motion shall be granted unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof

as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

FRAME OF BILLS.

20.

Every bill in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the judges of the circuit court of the United States for the district of ——: A. B., of ——, and a citizen of the State of ——, brings this his bill against C. D., of ——, and a citizen of the State of ——, and E. F., of ——, and a citizen of the State of ——. And thereupon your orator complains and says that," &c.

21.

The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defence to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defence or excuse to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is required, it shall also be specially asked for.

22.

If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of

the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

23.

The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon, as justice may require upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process.

24.

Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

25.

In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the State court of chancery in the district, if any there be ; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

SCANDAL AND IMPERTINENCE IN BILLS.

26.

Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, in *hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a master, by any judge of the court, for impertinence or scandal ; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

27.

No order shall be made by any judge for referring any bill, answer, or pleading, or other matter or proceeding, depending before the court, for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule-day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule-day, or the master shall certify that further time is necessary for him to complete the examination.

AMENDMENT OF BILLS.

28.

The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill, in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterward, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course) after a copy has been so taken, before any answer or plea or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish, in like manner, to the defendant, a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

29.

After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule-day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not

made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

30.

If the plaintiff so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office on or before the next succeeding rule-day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

DEMURRERS AND PLEAS.

31.

No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant; that it is not interposed for delay; and, if a plea, that it is true in point of fact.

32.

The defendant may at any time before the bill is taken for confessed, or afterward with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination, and the facts on which the charge is founded.

33.

The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

34.

If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And,

upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule-day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

35.

If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill, upon such terms as it shall deem reasonable.

36.

No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

37.

No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

38.

If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument on the rule-day when the same is filed, or on the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose.

ANSWERS AND DISCOVERY.

39.

The rule, that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defence (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and dis-

cover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill, to avoid or repel the bar or defence. Thus, for example, a *bona fide* purchaser, for a valuable consideration without notice, may set up that defence by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

40.

A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto ; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer ; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

DECEMBER TERM, 1850.

Ordered, That the fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the circuit courts, be, and the same is hereby, repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery.

41.

The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, &c. ; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say : " The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3," &c. ; and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

DECEMBER TERM, 1871.

Amendment to 41st Equity Rule.

If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard

to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only ; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause ; but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the act of Congress of July 2, 1864.

42.

The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note, after the bill is filed, shall be considered and treated as an amendment of the bill.

43.

Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words " To the end therefore," there shall hereafter be used words in the form or to the effect following : " To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer ; that is to say—

" 1. Whether, &c.

" 2. Whether, &c."

44.

A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer ; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.

45.

No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend

the same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

46.

In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule-day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer.

PARTIES.

47.

In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

48.

Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.

49.

In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or

rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

50.

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiffs shall be at liberty to make the heir at law a party where he desires to have the will established against him.

51.

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

52.

Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order-book, in the form or to the effect following, (that is to say:) "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

53.

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

54.

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not

appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

INJUNCTIONS.

55.

Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance, and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case where an injunction—either the common injunction or a special injunction—is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

56.

Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties, entitled to revive the same; which bill may be filed in the clerk's office at any time; and, upon suggestion of the facts, the proper process of subpoena shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule-day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

57.

Whenever any suit in equity shall become defective from any event happening after the filing of the bill, (as, for ex-

ample, by change of interest in the parties,) or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule-day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto, on the next succeeding rule-day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

58.

It shall not be neeessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

VERIFICATION OF ANSWERS.

59.

Every defendant may swear to his answer before any justiee or judge of any court of the United States, or before any commissioner appointed by any circuit court to take testimony or depositions, or before any master in chancery appointed by any circuit court, or before any judge of any court of a State or Territory.

AMENDMENT OF ANSWERS.

60.

After an answer is put in, it may be amended, as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a doeument, or other small matter and be resworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defences, or qualifying or altering the original statements, except by special leave of the court, or of a judge thereof, upon motion and cause shown, after due notiee to the adverse party, supported, if required, by affidavit; and in every case where leave is so granted, the court or the judge granting the same may, in his diseretion, require that the same be separately engrossed, and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

EXCEPTIONS TO ANSWERS.

61.

After an answer is filed on any rule-day, the plaintiff shall be allowed until the next succeeding rule-day to file in the

clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court, or a judge thereof; and, if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

62.

When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had, by two or more of the defendants separately, costs shall not be allowed for such separate answers, or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

63.

Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule-day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule-day thereafter, before a judge of the court, and shall enter, as of course, in the order-book, an order for that purpose; and if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient; provided, however, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

64.

If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule-day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct.

65.

If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs

occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

REPLICATION AND ISSUE.

66.

Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule-day thereafter; and in all cases where the general replication is filed, the cause shall be deemed, to all intents and purposes, at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion, for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

TESTIMONY AND DEPOSITIONS.

67.

After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases, the commissioner or commissioners shall be named by the court, or by a judge thereof. If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories.

DECEMBER TERM, 1854.

Ordered, That the sixty-seventh rule governing equity practice be so amended as to allow the presiding judge of any court exercising jurisdiction, either in term time or in vacation, to vest in the clerk of said court general power to name commissioners to take testimony in like manner that the court or judge thereof can now do by the said sixty-seventh rule.

DECEMBER TERM, 1861.

Ordered, That the last paragraph in the sixty-seventh rule in equity be repealed, and the rule be amended as follows: Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court, the examiner to be furnished with a copy of the bill and answer, if any; and such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, and which shall be conducted as near as may be in the mode now used in common-law courts. The depositions taken upon such oral examinations shall be taken down in writing by the examiner in the form of narrative, unless he determines the examination shall be by question and answer in special instances; and, when completed, shall be read over to the witness and signed by him in the presence of the parties or counsel, or such of them as may attend; provided, if the witness shall refuse to sign the said deposition, then the examiner shall sign the same; and the examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practised with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given by the respective counsel or solicitors, to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original deposition, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in the thirtieth section of act of Congress, September 24, 1789.

Testimony may be taken on commission in the usual way, by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons satisfactory to the court or judge.

DECEMBER TERM, 1869.

Amendment to 67th Rule.

Where the evidence to be adduced in a cause is to be taken orally, as provided in the order passed at the December term, 1861, amending the 67th General Rule, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defence, and a time thereafter within which the complainant shall take his evidence in reply ; and no further evidence shall be taken in the cause, unless by agreement of the parties, or by leave of court first obtained, on motion, for cause shown.

68.

Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition taken under the act of Congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable.

69.

Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time ; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances ; but, by consent of the parties, publication of the testimony may at any time pass into the clerk's office, such consent being in writing, and a copy thereof entered in the order-books, or indorsed upon the deposition or testimony.

70.

After any bill filed and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of

the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony.

71.

The last interrogatory in the written interrogatories to take testimony now commonly in use shall in the future be altered, and stated in substance thus: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

CROSS-BILLS.

72.

Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.

REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.

73.

Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to whom it is referred to take the same to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

74.

Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule-day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

75.

Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings, and to make his report, and to certify to the court or judge the reasons for any delay.

76.

In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination, or answer brought in or used before them shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination, or answer were so brought in or used.

77.

The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office or by deposition, according to the acts of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

78.

Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the com-

missioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence, it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court, if the court shall, in its discretion, deem it advisable.

79.

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, in the master's office, or by deposition, as the master shall direct.

80.

All affidavits, depositions, and documents which have been previously made, read, or used in the court, upon any proceeding in any cause or matter, may be used before the master.

81.

The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court, if necessary.

82.

The circuit courts may appoint standing masters in chancery in their respective districts, both the judges concurring in the appointment; and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular

case shall be fixed by the circuit court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but, when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

MASTERS' REPORTS.

83.

The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order-book. The parties shall have one month from the time of filing the report to file exceptions thereto; and, if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule-day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session; or, if not, then at the next sitting of the court which shall be held thereafter, by adjournment or otherwise.

84.

And, in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs; the cost to be fixed in each case by the court, by a standing rule of the circuit court.

DECREES AND ORDERS.

85.

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrolment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

86.

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at

this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:" [Here insert the decree or order.]

GUARDIANS AD LITEM.

87.

Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court may direct for the protection of infants and other persons.

REHEARINGS.

88.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

GENERAL PROVISIONS.

89.

The circuit courts (both judges concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, *mesne* and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

90.

In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as

positive rules, but as furnishing just analogies to regulate the practice.

91.

Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

DECEMBER TERM, 1863.

92.

Ordered, That in suits in equity for the foreclosure of mortgages in the circuit courts of the United States, or in any court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money.

OCTOBER TERM, 1878.

INJUNCTIONS.

93.

When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.

STOCKHOLDERS' BILLS.

94.

Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing Directors or Trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.

INDEX.*

ACKNOWLEDGMENT. PAGE

Of bond on removal, said to be a matter of practice, in control of the State Court. 37–38

Want of, on bond for removal, cannot be raised for the first time in Supreme Court..... 38

ADMINISTRATOR.

His own citizenship, not that of those he represents, is the test of jurisdiction... 11

State Statutes of limitation, in action against..... 18

Pendency of probate proceedings in State Court is no bar to bill in Federal Court, against.. 19

Right to sue in Federal Court on note or chose in action of deceased..... 24

What is sufficient allegation of citizenship of?..... 34

May take an appeal without revivor of the suit..... 53

AFFIDAVIT.

On removal. See REMOVAL OF CAUSES, IV., 3.

ALIENAGE.

No jurisdiction of controversy between two aliens on ground of citizenship..... 11

Form of allegation of..... 12

Not terminated by filing declaration of intention to become a citizen..... 12

See CITIZENSHIP.

ALIMONY.

Federal Courts may not allow, but may enforce payment of..... 5

AMENDMENT.

Bringing in new parties after removal, no ground for remandment. 28

When petition may be amended after removal 35-36

Of bond, allowable after removal..... 37

See PLEADING; REMOVAL OF CAUSES, IV., V., VI.

AMOUNT IN DISPUTE.

See MATTER IN DISPUTE.

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ANCILLARY LITIGATION. PAGE

Jurisdiction once acquired is retained as to all ancillary litigation 15
Distinction between supplemental and ancillary, and original and independent, proceedings 15–16
Mandamus, certiorari, &c., allowable only when ancillary 3
Substituted service allowable in when. (See SUBSTITUTED SERVICE.) 51

APPELLATE JURISDICTION OF CIRCUIT COURTS.

Statutory provisions 24

APPEALS FROM STATE COURTS.

Quære, is remandment of, reviewable? 31
See "ARISING UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES;" JURISDICTION OF FEDERAL COURTS; STATE COURTS.

"ARISING UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES."

In general 7–10
Is substantially the language of the Constitution 7
A case so arises where a right depends on the construction given to either 7
Jurisdiction when the plaintiff or defendant is a corporation chartered by Congress 7
But National Banks are excepted by Judiciary Act of 1887 ..... 8, 55
When the corporation has been created by a Territorial law 8
Suit to enjoin infringement of patent does not so arise where its validity is admitted by defendant 8
A suit on a judgment of a Federal Court does not so arise 8–9
Quo Warranto, to determine title to office of Presidential electors. 9
Jurisdiction of suit so arising where a State is sued by one of its own citizens 9
All such suits removable whenever Federal Courts would have had original jurisdiction (text of the act) 24–25
Facts showing jurisdiction on this ground must appear on face of the record 10, 34
When jurisdiction claimed on immaterial averments as to, cause must be dismissed or remanded 42
Quære, have Federal Courts jurisdiction of copyright or patent suits involving less than two thousand dollars? 57
See JURISDICTION OF FEDERAL COURTS; REMOVAL OF CAUSES.

ARREST.

Under Act of 1887, bail given in State court is not discharged by removal of the suit 39
Jurisdiction to grant provisional remedies may be obtained by premature filing of record in Federal Court 49

ASSESSMENTS. PAGE

State laws giving lien for betterments recognized 18

ASSIGNMENT.

Of promissory note, no right in assignee to sue in Federal Courts 2, 21, 22
Colorable assignment of cause of action, to obtain access to Federal Courts on ground of citizenship 42
See CHOSE IN ACTION.

ATTACHMENT.

In State Court, no bar to removal 19
In State Court, continues to hold goods after removal (text of the act) 38
But it seems a Federal Court may authorize its marshal to take possession of such goods 39
Jurisdiction to grant provisional remedies may be obtained by premature filing of record in Federal Court 49

ATTORNEY.

May sign petition for removal 35
—Or bond on removal 37

BAIL.

Given in State Court, not discharged by removal, since Act of 1887 39

BANKS, NATIONAL.

No jurisdiction over suits in which they are parties, on ground of being Federal corporations, since Act of 1887 ..... 8, 55

BETTERMENTS.

State laws giving lien for, recognized by Federal Courts 18

BILL OF REVIEW.

Time within which it must be filed after service without the State. 51

BILL TO QUIET TITLE.

State laws authorizing, recognized by Federal Courts 18

BILLS OF EXCHANGE.

When assignee of foreign, may sue in Federal Court 2
Policy which dictated this provision 20
Check on domestic bank is not an inland bill 20
See CHOSE IN ACTION.

BOND, MUNICIPAL.

Suit by assignee of, in Federal Courts 24

BOND ON REMOVAL.

See REMOVAL OF CAUSES, IV., 2.

BONDS.

Given prior to removal of suit, remain valid afterward 39

" CASES." PAGE

As distinguished from "suits of a civil nature". 2

CERTIORARI, WRITS OF.

United States Courts cannot issue, except as ancillary to process otherwise cognizable..... 3

May issue to compel a State Court to make return of the record of a case removed..... 47

CHECK.

On domestic bank not an inland bill of exchange..... 20

CHOSE IN ACTION.

Assignee of, can sue in Federal Courts only when assignor could..... 2, 21-24

Rule includes both legal and equitable assignments..... 21

Is a term of comprehensive import 21

Rule includes suit to enforce payment of mortgage debt..... 21-22

—But not suit to recover possession of mortgaged premises..... 22

Rule includes suit for specific performance..... 21

—But not for tortious taking, &c., of a chattel..... 22

—Nor where chattel is sought to be recovered in specie..... 23

—Nor suit by endorsee against endorser, who resides in same State as maker..... 23

What is meant by "contents" of ?..... 21-22, 23

Rule includes assignments made by operation of law..... 24

—But not suits by the representatives of a deceased person or receivers..... 24

This restriction does not prevent removal for prejudice or local influence..... 30

CIRCUIT COURTS.

Appellate Jurisdiction of..... 24

Removal to, from District Court, on account of disability of judge. 24

See JURISDICTION OF FEDERAL COURTS; REMOVAL OF CAUSES; and titles there cited.

CITIZENSHIP.

Of formal parties with no real interest, disregarded..... 10

No jurisdiction on this ground, of suit between two aliens..... 11

Nor of suit between a citizen of the District of Columbia or of a Territory and a citizen of a State..... 11

Nor of a suit by one State against a citizen of another State..... 11

Corporation presumed to consist of citizens of the State chartering it..... 11

Same presumption as to unincorporated associations, when..... 11

Of corporation chartered in several States..... 11

Of municipal corporation..... 11

Of one suing or sued as receiver, executor, or administrator..... 11

Of an infant, though suing by guardian or next friend..... 12

Must appear on the face of the record when jurisdiction is claimed on that ground..... 12, 41

PAGE
—And the citizenship of each party must be set forth..... 12, 34
Allegation of residence or domicile is insufficient..... 12, 34
Form of averment of alienage..... 12
A consul is not presumed a citizen of the State he represents..... 12
Filing declaration of intention to become a citizen does not terminate alienage..... 12
On change of domicile, depends on intention..... 12
— But intention shown more satisfactorily by acts than declarations..... 12
Exercise of right of suffrage conclusive of intent..... 12
Of no State in particular..... 12
Change of citizenship for the purpose of suing in Federal Court is no bar to such suit..... 12
Allegation of citizenship of a corporation..... 13
Removal on ground of, only by non-resident defendants..... 26
— Except, perhaps, where controversy "wholly between citizens of different States"..... 26
Removal of controversy "wholly between citizens of different States"..... 10, 28
Jurisdiction on ground of, once obtained cannot be defeated by bringing in new parties..... 28
Practice where parties improperly joined to prevent removal for.. 29
Improper joinder of parties to obtain access to Federal Courts on ground of..... 40
Colorable assignments to obtain access to Federal Courts, on ground of..... 29, 42
What is a sufficient allegation of, for removal?..... 34
To sustain removal, except for prejudice or local influence, must have existed since commencement of suit..... 30, 34
Allegation of, of executors..... 34
Want of requisite, must be pleaded, or no evidence of it may be given..... 40, 42
Must appear on face of record, or suit may be dismissed at any time. 41
Burden of proving, is on party seeking removal..... 42
National banking associations deemed citizens of the State in which they are situated..... 55
See CONTROVERSY; JURISDICTION OF FEDERAL COURTS; PARTIES; REMOVAL OF CAUSES.

CIVIL RIGHTS ACTS.

Jurisdiction under, not affected by Act of 1887..... 55
Construction and constitutionality of..... 55, 56

COMITY.

See "PROPERTY IN THE CUSTODY OF A STATE COURT;" "STATE LAWS."

CONDEMNATION PROCEEDINGS.

Jurisdiction of Federal Courts as to..... 4-5

CONSTITUTIONAL LAW. PAGE

See "ARISING UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES."

CONSUL.

Not presumed a citizen of the State which he represents..... 12

CONTROVERSY.

Defined..... 10
Word controversary substituted for, in Act of 1887, Section 1..... 10
Position of parties in pleadings disregarded in determining between whom it lies..... 10
Citizenship of formal parties, with no real interest in, disregarded. 10
In action brought by a State for benefit of an individual..... 11
Must be wholly between citizens of different States.....10, 28
— And this is not the case when defendant charged jointly with fellow-citizen of plaintiff..... 28
— Even though the obligation itself be joint and several..... 29
— Or though defendants file separate answers..... 29
— Or though one of the defendants is in default..... 29
— Or though judgment entered against one defendant before other served with process..... 29
Practice where parties improperly joined to prevent removal on ground of..... 29
Improper joinder of parties to obtain access to Federal Court is a ground for dismissing or remanding..... 40
Where only one, all defendants must join in removal..... 29
— So that if one has lost his right to remove, the other cannot do so..... 29
Removal takes entire suit, not controversy alone, into the Federal Court..... 29
Dismissal or remandment of suit when controversy not cognizable or parties thereto have been collusively joined (text of the act).. 40
See CITIZENSHIP; PARTIES; REMOVAL OF CAUSES, II.

COPYRIGHT.

Quære, must matter in dispute exceed two thousand dollars to permit Federal jurisdiction of suits, to enforce?..... 57
Quære, have State courts jurisdiction of suits in which less than two thousand dollars is involved?..... 58

CORPORATION.

Jurisdiction of suits by assignee of negotiable paper of..... 2
Quære, are public or quasi-public corporations included?..... 24
Federal, jurisdiction of suits in which it is a party..... 7
But National Banks excepted by Act of 1887.....8, 55
Territorial, no jurisdiction of..... 8
Conclusively presumed to be composed wholly of citizens of State chartering it..... 11
Municipal, presumed a citizen of the State where situated..... 11
When in hands of receiver, his citizenship determines jurisdiction. 11

PAGE
What is a sufficient allegation of citizenship of?..... 13
Quære, can it be sued in a district of which it is not an inhabitant?..... 13–14
— Or can it have a residence apart from the State chartering it?. 14
Agreement by, not to remove any suits brought in a State, is void. 27
May be excluded from business in a State except when engaged in interstate commerce..... 27
Agreement by, not to remove a specified suit, is valid..... 27
Rule as to necessary averments in stockholder's bill to enforce its rights when its officers refuse to do so..... 42
— It must allege that the suit is not collusive..... 42
— What is a sufficient allegation of this?..... 43
— It must also allege what efforts plaintiff has made to induce action by the corporation itself..... 43
— When plaintiff is excused from making such efforts..... 44
See RECEIVER.

COSTS.

What, are allowable when the suit is remanded?.....38, 40
What, are allowable when the suit is dimissed for failure to proceed after removal?..... 38
What, are allowable on final judgment after removal?..... 46–47

COUNTERCLAIM.

Amount, of may be included in estimating matter in dispute.. 27–28

CUSTODY OF CHILDREN.

Suits as to, not removable, because the subject-matter has no pecuniary value..... 5, 28

DEATH OF PARTY.

Does not necessitate revivor, in order that appeal may be taken.. 53

DECEDENT'S ESTATES.

Claims against, cognizable in Federal Courts..... 4

DEMURRER.

Argument of, is a "trial," and removable as such 30

DEPOSITION.

Order of State Court for, to be taken before trial, must be vacated on removal..... 39

DISABILITY.

Of judge is ground for removal from District to Circuit Court.... 24

DISMISSAL.

For want of jurisdiction or improper or collusive joinder of parties. 40
Facts showing right to, should be pleaded..... 40
See JURISDICTION OF FEDERAL COURTS; REMOVAL OF CAUSES, VIII.

DISTRICT COURTS.

Removal from, to Circuit Courts, for disability of judge..... 24

DIVORCE. PAGE

Federal Courts have no jurisdiction... 5
— But may enforce payment of alimony..... 5

DOMICILE.

On change of, the citizenship depends on intention..... . 12
But intention judged of by acts rather than declarations..... 12
Exercise of suffrage conclusive as to intent..... 12

EQUITY.

State Statutes as to, do not affect Federal practice..... 16

EXECUTOR.

His own citizenship, not that of those he represents, is the test... 11
State Statutes of limitation, in actions against..... 18
Pendency of probate proceedings in State Court no bar to bill in Federal Court, against 19
Right to sue in Federal Court on promissory note or chose in action, &c.... 24
What is a sufficient allegation of citizenship of?..... 34
May take an appeal without a revivor of the suit 53

FRAUD.

In acquiring possession, no ground for interference with property in custody of a State Court 19
In joining parties, ground of dismissal or remandmeut.....40, 41

GRANT OF LAND FROM DIFFERENT STATES.

See LAND GRANTS FROM DIFFERENT STATES.

HABEAS CORPUS.

Statutory provisions as to..... 3
See MATTER IN DISPUTE.

INJUNCTION.

State laws regulating, not recognized when they impair Federal jurisdiction..... 17
— Except when they create a new class of *rights*..... 18
When argument of motion for, held equivalent to a "trial"....30, 31
Of State Courts, remains valid after removal of the suit.... ... 39
But Federal Court cannot punish its violation before removal..... 39
Jurisdiction to grant, obtained by premature filing of record..... 49

INTERSTATE COMMERCE ACT.

Powers of Circuit Courts under.... ....3, 14

JOINT STOCK COMPANY.

When presumed to be composed wholly of citizens of one State... 11

JUDGE.

Cannot appoint certain relatives to office..... 58
Disability of, is ground for removal from District to Circuit Court. 24

JUDGMENT. PAGE

When suits on, not cognizable in Federal Courts..... 8–9
State Statutes regulating suits on, when not recognized..... 17
Proceedings on, in State Court, may be stayed by Federal Court. 19
Creditors' bill to enforce, may be brought in Federal Court, though suit itself might not have been..... 16
— But not statutory proceedings supplementary to execution..... 16
Service of judgment debtor without the jurisdiction, in sequestration proceedings..... 51
See ANCILLARY LITIGATION.

JUDICIARY ACTS, TEXT OF.

Section 1, Act of 1875, as amended in 1887.....1–2
Section 2, Act of 1875, as amended in 1887.....24–26
Section 3, Act of 1875, as amended in 1887.....31–33
Section 4, Act of 1875.....38–39
Section 5, Act of 1875, as amended in 1887.....39–40
Section 6, Act of 1875.....44–45
Section 7, Act of 1875.....47–48
Section 8, Act of 1875.....49–50
Section 9, Act of 1875..... 53
Section 10, Act of 1875..... 53
Section 2, Act of 1887..... 53
Section 3, Act of 1887..... 54
Section 4, Act of 1887..... 55
Section 5, Act of 1887..... 55
Section 6, Act of 1887..... 56
Section 7, Act of 1887..... 58

JURISDICTION.

Of STATE COURTS. See that title.

JURISDICTION OF FEDERAL COURTS.

"ARISING UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES," or depending upon CITIZENSHIP; CONTROVERSY; LAND (grants from different States); MATTER IN DISPUTE; PARTIES, &c. See those titles.

"Of suits of a civil nature." See CERTIORARI; CONDEMNATION PROCEEDINGS; DECEDENT'S ESTATES; DIVORCE; HABEAS CORPUS; MANDAMUS; PROHIBITION; QUO WARRANTO, &c. See also CHOSE IN ACTION; REMOVAL OF CAUSES;—of STATE COURTS, see that title.

Matter in dispute must exceed two thousand dollars.....1, 26
Where a Federal corporation is a party..... 7
Where a National Bank or Territorial corporation is a party....8, 55
Suits to enjoin use of patents, where defendant admits their validity..... 8
Where a State sued by its own citizen..... 9
Suit between two aliens 11
Special limitation on U. S. Circuit Court for Southern District of New York..... 14

PAGE

Once acquired, covers all ancillary litigation..... 15
Not affected by State Statutes, instances.....16–18
But Federal Courts take notice of new rights created by Statute or customary law of State.....17–18
Appellate, of Circuit Courts..... 24
Once acquired by removal cannot be defeated by reduction of amount demanded..... 27
—Nor by any events subsequent to removal..... 27
Once acquired by original process or removal cannot be defeated by amendment bringing in new parties or causes of action..... 28
What are sufficient allegations of, in petition for removal?..... 34
Jurisdictional amount must appear on the face of the record..... 35
When parties improperly joined to prevent removal..... 29
None, where parties improperly joined to obtain jurisdiction..... 40
Dismissal for want of..... 40
Want of, must be pleaded before evidence may be given as to..40, 42
But Court itself may inquire as to when it suspects collusion..... 41
Must be shown affirmatively on the record, or suit may be dismissed at any time..... 41
Consent to, may waive a previous want of, when..... 41
Burden of proving requisite citizenship, is on removing party..... 42
All questions as to, must be tried in the Federal Court..... 42
None, where colorable assignment of cause of action made to citizen of another State..... 42
Rule as to necessary averments in Stockholders' bill to enforce rights of corporation, because its officers refuse to do so. (See CORPORATIONS).....42–44
Not necessary that process (before removal) be served within the Federal District to which suit removed..... 46
None, on removal, where State Court had none..... 46
Jurisdictional facts may appear in either pleadings or petition.... 46
Not ousted by failure to file record..... 48
But it is ousted by order remanding for failure to file record..... 35
To grant provisional remedies, may be obtained by premature filing of record..... 49
— But cause may not be heard till time specified in bond has expired..... 49
Of suits under "Civil Rights Act," and against revenue officers, not affected by Act of 1887.....55–56
Of pending suits, not affected by Act of 1887, except when expressly so stated.....56
Quære, have Federal Courts jurisdiction over copyright or patent suits involving less than two thousand dollars?..... 57
See REMOVAL OF CAUSES.

LAND GRANTS FROM DIFFERENT STATES.

Jurisdiction..... 13
Jurisdiction not affected by equitable title prior to the grant. 13
Removal of suits affecting, only by non-resident defendants..... 26

PAGE
Removal by any party, when..... 32
When party refusing to state such grant, on demand, is precluded from pleading or proving it.....32–33
When removing party may only prove title stated as ground of removal..... 33

LAWS.

See "ARISING UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES;" STATE LAWS.

LIMITATION, STATE STATUTES OF.

Recognized where no Federal Statute..... 18
Cannot bar the United States..... 18
Generally followed in Federal Courts of Equity..... 18
— But not where they work manifest injustice.....18–19
In certain actions..... 18

LOCAL INFLUENCE.

See REMOVAL OF CAUSES, III.

MANDAMUS.

Not generally cognizable in Federal Courts..... 2
— Exceptions 3
Special provision as to the Union Pacific Railroad..... 3
Under Interstate Commerce Act..... 3
Quære, can it be used to review a remandment?..... 31

MATTER IN DISPUTE.

Must exceed two thousand dollars..... 1
General observations as to.....5–7
Phrase is construed strictly..... 5
As to personal rights that have no value in money (personal liberty, custody of childreu).....5, 28
Must be an actual and present value in money, determined by inspection of the record.....5, 6
When amount demanded determines..... 6
Upon bill for an accounting..... 6
In suit to enjoin use of trade-mark..... 6
In suit for injunction..... 6
When the united interests of several plaintiffs is taken..... 6
When plaintiff sues for himself and all others of a class who may join..... 6
Must appear on the face of the record..... 6
Must exceed two thousand dollars to permit a removal..... 26
Reduction of amount of, after removal, cannot impair jurisdiction. 27
If sufficient when suit removed, no subsequent event can affect jurisdiction..... 27
If increased to statutory amount, by counterclaim, permits a removal.....27–28

PAGE
In copyright or patent suits, must it exceed two thousand dollars?. 57
See JURISDICTION OF FEDERAL COURTS ; REMOVAL OF CAUSES.

MOTIONS.
Denied by State Court before removal, should not be renewed without leave afterward..... 46

MORTGAGE.
State statutes regulating suits affecting, not recognized by Federal Courts..... 17
— Except when they create a new class of rights 18
Is a chose in action, within the restriction as to suits by assignee of. 21
Assignee of, can sue in Federal Courts only when assignor could, when payment is sought to be enforced.....21, 22
— Otherwise when possession of mortgaged premises only is sought. 22

MUNICIPAL BOND.
Suit by assignee of 24

NATIONAL BANKS.
Jurisdiction in suits affecting.....8, 55

ORDERS.
Of State Courts remain valid after removal of the suit.....39, 46
But it seems that Federal Courts cannot punish their violation, before removal 39
Of State Court, for examination of party before trial, should be vacated on removal..... 39

PARTIES.
Position of, in pleadings disregarded, in determining between whom controversy lies..... 10
Citizenship of formal parties does not affect jurisdiction..... 10
Removal on ground of status of, only where Circuit Court would have original jurisdiction..... 26
Bringing in new parties cannot defeat jurisdiction once acquired.. 28
Improper joinder of, to prevent removal..... 29
Improper joinder of, to obtain access to Federal Courts..... 40
Death of, does not necessitate revivor, in order that appeal may be taken..... 53
— But representatives may continue suit on filing proof of their appointment..... 53
See CITIZENSHIP ; CONTROVERSY ; JURISDICTION ; REMOVAL OF CAUSES.

PATENTS.
Suits to enjoin use of, no jurisdiction where defendant admits validity..... 8
Quære, must matter in dispute exceed two thousand dollars to permit Federal jurisdiction of suits in?..... 57
Quære, have State Courts jurisdiction of suits in, when less than two thousand dollars involved?..... 57

PENDING SUITS. PAGE

Not affected by Act of 1887, except, &c. 56
Removed for prejudice or local influence, must be remanded, under Act of 1887, when 25, 27, 58

PETITION FOR REMOVAL.

See REMOVAL OF CAUSES, IV., 1.

PLEADING.

Matter in dispute must appear on the face of the record 6, 35
Where jurisdiction is claimed on the ground that case arises under the Constitution or Laws of the United States, that fact must be alleged 10
— Allegation of this in the words of the Statute is insufficient ... 10
Averment of alienage 12
Citizenship must appear on the face of the record, when 12, 34
— And an allegation of residence or domicile is insufficient 12
Allegation of citizenship of a corporation 13
Inhabitancy of defendant need not be alleged by plaintiff 14
State Statutes regulating, cannot impair Federal jurisdiction 17
Party may compel his opponent to state if he claims land under a grant from a different State 32, 33
— And the right to give evidence thereof is limited by such statement 33
Contents of affidavit on removal for prejudice or local influence 33, 56–57
Jurisdictional facts may appear either in pleadings or petition for removal 34
Allegation of jurisdiction in the words of the Statute, or upon information and belief, is insufficient 34
Want of jurisdiction must be pleaded, or no evidence of it may be given 40, 42
— Except where the Court suspects collusion 41
If jurisdiction does not appear affirmatively on the record, the suit may be dismissed at any time 41
How allegations in petition for removal may be contradicted 42
Rule as to necessary allegations in stockholder's bill to enforce rights of corporation on ground of refusal of its officers to do so. 42
— It must be verified 42
— And allege that suit is not collusive to confer jurisdiction of suit not otherwise cognizable 42
— What is a sufficient allegation of this? 43
— It must state what efforts plaintiff has made to induce action by corporation itself 42
— What is a sufficient allegation of this? 44
— When plaintiff is excused from making such efforts 44
For practice on removal, see REMOVAL OF CAUSES, IV.

PRACTICE ON REMOVAL.

See REMOVAL OF CAUSES, IV.

PREJUDICE OR LOCAL INFLUENCE. PAGE

See REMOVAL OF CAUSES, III.

PROHIBITION, WRITS OF.

Only issued by Supreme Court..... 3

PROMISSORY NOTES.

When Federal Courts have no jurisdiction of suits on by assignee..... 2, 21, 22
Endorsee may sue remote endorser, though plaintiff is a citizen of same State as maker..... 23

PROPERTY IN CUSTODY OF STATE COURT.

Federal Courts usually will not interfere with..... 19
—Even though the custody was acquired by fraud..... 19
Fact of such custody must be raised before final hearing..... 19
Pendency of probate proceedings in State Court does not prevent bill against executor or administrator in Federal Court..... 19
Bill may be filed to stay proceedings on judgment of State Court. 19
Suit may be removed, though receiver appointed by State Court in it..... 19
— Or property taken into possession under common law writ..... 19
Constructive possession..... 19
If suit first brought in Federal Court, it will enforce its right to custody..... 20
Same comity prevails between different Federal Courts..... 20
Receiver appointed before removal remains in possession and may be required to account in Federal Court..... 39

PROVISIONAL REMEDIES.

Jurisdiction to grant, may be obtained by premature filing of record in Federal Court..... 49

PUBLICATION, SERVICE BY.

See SERVICE WITHOUT THE JURISDICTION OR BY PUBLICATION.

QUO WARRANTO.

Removal of, when brought by a State in a State Court..... 3
To determine title to office of Presidential electors does not arise "under the Constitution or laws of the United States"..... 9

RECEIVER.

His own citizenship, not that of his corporation, determines jurisdiction..... 11
Appointment by State Court does not bar removal..... 19
Not prohibited to sue in Federal Courts under rule as to assignees of choses in action..... 24
Appointed before removal, continues in possession afterward..... 39
Must manage property in accordance with the laws of State in which it is situated..... 53–54
Penalty where he neglects to so manage property..... 54

PAGE
May be sued without leave of Court 54
When he may not employ relative as counsel 58

RECORD, FILING OF.
See REMOVAL OF CAUSES, VII.

REMANDMENT TO STATE COURTS.
See REMOVAL OF CAUSES, VIII.

REMOVAL OF CAUSES.

I. IN GENERAL.

From District to Circuit Court, for disability of judge 24
Text of the Removal Act (Section 2) 24–26
Only when matter in dispute exceeds two thousand dollars ... 24, 26
Reduction of amount demanded, after removal, will not defeat it .. 27
If amount sufficient when removal occurs, no subsequent change in, can defeat it 27
Matter in dispute may include counterclaim 27, 28
Decision of Circuit Court remanding, not reviewable 26, 31
— But omission to remand is, even though no motion made at Circuit 31
Quære, is remandment, of appeal from State Court, reviewable? ... 31
Four important changes as to removals, made by Act of 1887 26
On ground United States are plaintiffs or petitioners, only by non-resident defendants 26
On ground of status of parties, only by non-resident defendants .. 26
Only allowable under Act of 1887, in cases of which Circuit Courts have original jurisdiction 27
— Except where sole objection to original jurisdiction was non-residence of defendant 27
Agreement by corporation not to remove any suits brought against it in a State, is void 27
But a corporation may be excluded by a State from doing business within it 27
Stipulation not to remove a specific suit is valid 27
Cannot be defeated by any events subsequent to 27
Of suits involving personal rights incapable of pecuniary value (personal liberty, custody of a child) 28
Cannot be defeated subsequently to, by bringing in new parties or causes of action 28
State jurisdiction completely ousted by 31
—So that a trial on the merits in the State Court does not waive a removal already taken 31
Not barred till trial in State Court begun, actually and in good faith. 31
Barred by order remanding for failure to file record 35
State Courts not required to take notice of proceedings in Federal Courts 36
State Court retains jurisdiction until removability appears on its own records 36

PAGE
No order of State Court essential to removal..... 38
No jurisdiction in Federal Court, when State Court had none.... 46
Is not an appeal, but a change of venue.... .....29, 46

II. CONTROVERSY WHOLLY BETWEEN CITIZENS OF DIFFERENT STATES.

Text of the act..... 25
Only of suits mentioned in Section 2 of act..... 25
Position of parties in pleadings disregarded in determining between whom controversy lies..... 10
What controversy must exist?..... 28
Quære, must removal be by non-resident defendants?..... 25, 26
Controversy must be wholly between citizens of different States. 10, 25, 28
So not allowable where defendant charged jointly with fellow-citizen of plaintiff..... 28
—Even though the obligation itself be joint and several..... 29
—And though defendants file separate answers..... 29
—And though one of the defendants be in default..... 29
—And though judgment be entered against one, before the other served with process..... 29
Practice where parties improperly joined to prevent a removal.... 29
None when colorable assignment made to prevent a removal..... 29
All defendants must join in removal, where only one controversy. 29
If one defendant lost his right to remove, the other cannot do it alone..... 29
Removal takes the entire suit, not merely the controversy..... 29
See CONTROVERSY.

III. FOR "PREJUDICE OR LOCAL INFLUENCE."

Text of the act..... 25–26
Only by non-resident defendant..... 25
Must be a controversy between a citizen of the State where suit brought, and of another State..... 25
Exception as to defendants not prejudiced..... 25
Rule made stricter by Act of 1887..... 25, 26
Ground of removal must be made to appear to satisfaction of Circuit Court..... 25, 27
—Even in cases already removed..... 26, 58
Affidavit is not conclusive of existence of ground for removal, since Act of 1887..... 27
Is analogous to application to State Court for change of venue.... 29
State decisions on change of venue are followed by Federal Courts. 29
Requisite citizenship for, may be acquired at any time before removal..... 30, 34
Restriction as to suits by assignee of chose in action apparently does not prevent such removal..... 30
The argument of a dumurrer is a "trial"..... 30
—A motion for injunction..... 30

PAGE
—And an appeal from the decision of such motion has been held equivalent to a trial 31
—But not the entry of an order taking bill *pro confesso* 30
Right of, not barred till trial begun actually and in good faith in State Court 31
Uncertainty of practice as to 33
Quære, is R. S. 639 still in force as to? 33, 56–57
For practice on, See IV., *infra*.
On other grounds, see ARISING UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES; CITIZENSHIP; CONTROVERSY; JURISDICTION OF FEDERAL COURTS; LAND; MATTER IN DISPUTE.

IV. PRACTICE ON REMOVAL.

Text of Judiciary Act 31–33
Party may be required by his opponent to state if he claims land under grant from a different State 32
— And his proof must conform to such statement 33
State Courts need not take notice of removal proceedings in Federal Courts 36
— But retain jurisdiction until removability appears on their own records 36
No order of State Court is essential to removal 38
Petition and bond may be filed in vacation 38
Extension of defendant's time to answer, &c., extends also the time to remove 38
What costs are allowable when case remanded 38
Practice where defendants improperly joined to prevent removal. 29
Jurisdictional facts must appear either in pleadings or petition ... 46
Orders, &c., made by State Court remain in force after removal. 39, 46
— So a motion denied by the State Court cannot be renewed after removal without leave 46

1. *Petition.*

Must be filed in State Court 32
Must allege facts showing jurisdiction 34
Allegation of jurisdiction in words of the statute insufficient 34
Allegations showing jurisdiction must be positive and certain 34
What are sufficient allegations of citizenship? 34
Need not be verified 35
May be signed by party, or by attorney in law, or fact 35
Quære, may Circuit Court permit its amendment? 35
Semble, it can, only when State Court has assented to removal by order 35–36
Subsequent answer treated as an amendment to 36
May be filed in vacation 38
How allegations in, may be contradicted 42

2. *Bond.*

Must be filed in State Court 32
Must name a specific sum as the penalty 36

PAGE
Penalty of one thousand dollars ordinarily sufficient, where defendant has not been held to bail 36
Condition to file "copies of all process" is insufficient 37
Instance of bond held sufficient 37
Must provide for payment of costs in case of a remandment 37
Need not be executed by petitioner 37
May be executed by petitioner's attorney at law in his name 37
Defect in, may be cured by amendment, with leave of Court 37
— Or a new bond filed, with leave 37
It is customary to procure approval of, by State Court 37
Quære, can Federal Court approve it after disapproval by State Court, or disapprove it after State Court's approval? 37
Acknowledgment of, is said to be a matter of practice wholly in control of State Court 38
May be filed in vacation 38

3. *Affidavit.*

May be verified by any one 33
— But preferably by a party 33
Should state what 33
Must be verified in accordance with State laws 33

V. Effect of Removal on Previous Proceedings.

Text of the act 38-39
Attachment or sequestration in State Court continues to hold goods after removal 38
But it seems a Federal Court may authorize its marshal to take possession of such goods 39
Bonds and undertakings given prior to removal remain effectual afterward 39
Injunctions and orders made prior to removal remain in force afterward 39
But it seems that a Federal Court cannot punish a party for violation before removal of such order 39
And order for examination of party before trial must be vacated on removal 39
Bail no longer discharged by removal (since Act of 1887) 39
Stipulation made before removal will be enforced afterward 39
Receiver appointed before removal remains in possession, and may be required to account in Federal Court 39

VI. Practice after Removal.

Circuit Court acts as if suit originally brought in it 44-45
In common-law suits, no repleader necessary 45
— Nor in equity cases, where pleading in State Court contains the substance of a bill 45
— But repleader sometimes advisable in equity cases 45
Repleader necessary when both legal and equitable relief demanded in one suit 45

PAGE
— Practice when repleader neglected in such cases..... 45
Practice when plaintiff proceeds on wrong side of the Court after removal..... 45
In equity suits, defendant's right to plead expires on second rule-day after appearance..... 45
What is considered an action at law..... 45
Filing of petition and bond does not prevent motion in Federal Court to dismiss for want of jurisdiction of the person..... 46
See *infra*, VII., as to FILING OF RECORD.
Decisions of State Court before removal will be followed by Federal Court afterward..... 46
— So that it seems that a motion denied by State Court may not be renewed after removal without leave..... 46

VII. FILING OF RECORD.

Text of the act as to (Section 7)..... 47
Time within which it must be filed..... 47
Penalty for clerk of State Court refusing copy of it..... 47
Circuit Courts may issue certiorari to compel State Courts to make return of the record..... 47
Provision when copy of record cannot be obtained by removing party..... 47
When parties may be required to plead *de novo*..... 48
Remandment for failure to file bars second removal for same cause..... 35
But failure to file does not oust the jurisdiction of Federal Court, but leaves it discretional with that Court to proceed..... 48
What is a waiver of requirement as to filing?..... 48
Record includes depositions and pleadings..... 49
Where filed, when Court held in several places in the district.... 49
Record may be filed, on leave, prematurely 49
— And such filing gives Federal Court jurisdiction to grant provisional remedies, but the cause may not be heard till time named in bond has expired..... 49

VIII. REMANDMENT TO STATE COURTS.

Remandment not reviewable.....26, 31, 40
— Except, perhaps, by mandamus 31
— But failure to remand is, even though no motion made at Circuit..... 31
Quære, as to appeal from final order of State Court after remandment 31
For failure to file record bars a second removal for same cause.... 35
Completely reinvests jurisdiction of State Court..... 35
What costs are allowable on ?.....38, 40, 46
Text of the act providing for (Section 5).....39-40
On ground parties improperly or collusively made or joined..... 40
Evidence to make out a case for, must be pleaded... 40

PAGE

But failure to file record does not oust jurisdiction, it only leaves it discretional with Federal Court to proceed..... 48
For want of JURISDICTION, see more fully under that title.

REPEAL.

None, of certain sections of the Revised Statutes, by Act of 1887.. 55
Express, of certain other sections of the Revised Statutes..... 56

REPLEADER.

Not necessary after removal in suits at common law..... 45
— Nor in equity cases where pleading in State Court contains substance of a bill in equity..... 45
— But though not necessary, it is often advisable in equity cases. 45
Necessary when both legal and equitable relief demanded in suit, before removal..... 45
Practice when improperly omitted..... 45

RESIDENCE.

Of CORPORATIONS and as controlling JURISDICTION. See those titles.
See CITIZENSHIP ; DOMICILE.

REVENUE OFFICERS.

Jurisdiction of suits against, not affected by Act of 1887..... 55, 56

REVIEW, BILL OF.

Time within which it must be filed after service without the State. 51

REVIVOR, BILL OF.

Jurisdiction of, only by Court in which original suit was brought. 15
Not necessary to taking an appeal after death of a party..... 53

SERVICE WITHOUT THE JURISDICTION, OR BY PUBLICATION.

Text of the act (Section 8, Act of 1875)..... 49–50
Absent judgment debtor may be thus served in suit to sequester his assets..... 51
What is "Property within the district?"..... 51
Only allowed when it is shown by affidavit that personal service without the jurisdiction is impracticable..... 51
Personal service in another district is good, but safer practice is to first obtain an order authorizing it..... 51
Time designated for defendant's appearance need not be a rule-day..... 51
Time within which bill of review must be filed..... 51
But apart from the statute, the right is inherent in Courts of Equity to authorize substituted service..... 51
See SUBSTITUTED SERVICE.

SEQUESTRATION.

In State Court, continues to hold goods after removal..... 38
But it seems a Federal Court may authorize its marshal to take possession of such goods..... 39
Service on absent judgment debtor in suit to sequester his assets.. 51

SOUTHERN DISTRICT OF NEW YORK. PAGE

Special limitations upon Circuit Court of, as to causes of action arising in Northern District..... 14
Injunction against infringement of patent forbidden, where the previous infringements occurred in Northern District..... 14

SPECIFIC PERFORMANCE.

Assignee of contract may sue for, only when assignor could have. 21

STATE.

Quære, can it be sued by one of its citizens in a Federal Court in a case arising under the Constitution or Laws of the United States? 9

STATE COURTS.

Federal Courts will not usually interfere with property in the custody of..... 19
Jurisdiction completely reinvested when case remanded..... 35
Retains jurisdiction until facts justifying removal appear on its record..... 36
Is not bound to take notice of removal proceedings taken in Federal Courts..... 36
Approval by, of bond on removal..... 37
No order of, essential to removal from..... 38
Attachment or sequestration in, continues to hold goods after removal..... 38
Injunctions and orders of, prior to removal, remain in force afterward..... 39
But it seems that Federal Court cannot punish for violation, before removal, of such order..... 39
Orders of, for examination before trial, must be vacated on removal. 39
Cannot inquire into questions of Federal jurisdiction, on an application for removal..... 42
Certiorari may issue to, from Federal Courts, to compel return of record of case removed..... 47
Quære, have they jurisdiction of copyright or patent suits involving less than two thousand dollars?..... 57
See PROPERTY IN CUSTODY OF STATE COURT; REMOVAL OF CAUSES, VIII.

STATE DECISIONS.

Made in a case before removal, remain in force afterward.....39, 46
On change of venue, are followed by Federal Courts in removal cases..... 29

STATE STATUTES.

Cannot affect Federal jurisdiction, instances.....16–17
But Federal Courts take notice of *new rights* created by, instances..17–18
Excluding corporations from business in a State..... 27
Compelling foreign corporations to stipulate not to remove suits... 27
Of limitation, when followed in Federal Courts..... 18
Never followed when "manifest wrong" thereby worked..... 18

PAGE

Should be complied with as to form of affidavit on removal..... 33
Govern conduct of receivers appointed by Federal Courts.....53–54

STOCKHOLDER.

Rule as to allegations in bill by, to enforce rights of corporation on ground of refusal of its officers to do so. (See CORPORATIONS.)42–44

SUBSTITUTED SERVICE.

Power to authorize is inherent in Equity Courts and independent of Statute..... 51
Made upon the attorney who appeared for the absent party in the original litigation..... 52
Must be made on order of the Court..... 52
Practice in obtaining order for..... 52
Allowed when bill filed to stay proceedings on common-law side of the Court..... 52
— And when bill filed seeking new trial on same side of the Court. 52
—But not when bill filed to set aside a decree, which makes new parties defendants..... 52
—Nor on bill filed by receiver when defendants not parties to the suit in which he was appointed..... 52
If original complainant refuses to appear in cross-bill, his original suit may be stayed..... 52
See SERVICE WITHOUT THE JURISDICTION, OR BY PUBLICATION.

"SUITS OF A CIVIL NATURE."

As distinguished from "cases"..... 2
What are? See CERTIORARI; CONDEMNATION PROCEEDINGS; DECEDENT'S ESTATES; DIVORCE; HABEAS CORPUS; MANDAMUS; PROHIBITION; QUO WARRANTO; WILLS.

SUPPLEMENTAL BILL.

Jurisdiction of only by the Court in which the original bill was filed..... 15

TITLE, BILL TO QUIET.

State laws giving right to, recognized by Federal Courts..... 18

"TRIAL."

Such is argument of a demurrer..... 30
But not entry of an order taking bill *pro confesso* for failure to appear 30
Such has been held to be the argument of a motion for injunction..... 31
Must have begun, actually and in good faith, in State Court, before right to remove is gone..... 31

"UNDER GRANTS OF DIFFERENT STATES."

See LAND GRANTS FROM DIFFERENT STATES.

UNDERTAKINGS.

Given prior to removal of suit, remain valid afterward..... 39

UNINCORPORATED ASSOCIATION. PAGE

When presumed to be wholly composed of citizens of one State.. 11

UNION PACIFIC RAILROAD.

Specially subject to mandamus in United States Courts..... 3

UNITED STATES.

When plaintiffs or petitioners, removal on this ground only by non-resident defendants..... 26

VALUE IN DISPUTE.

See MATTER IN DISPUTE.

VERIFICATION.

Of affidavit on removal should be in accordance with State laws.. 33

WILLS.

Federal Courts have no probate jurisdiction..... 4
Proceedings to annul a will..... 4
State Statutes restricting suits on, cannot impair Federal jurisdiction..... 16
—Otherwise when they create a new right..... 17
Pendency of probate proceedings in State court is no bar to filing bill against executor or administrator in Federal Court..... 19
See DECEDENT'S ESTATES.